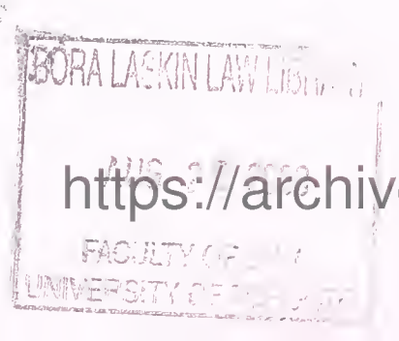
FREEDOM OF EXPRESSION AND THE PRESS

VOLUME 1

M. David Lepofsky

Fall 2008



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INTRODUCTION

From: M. David Lepofsky, "Towards A Purposive Approach to Freedom of Expression and Its Limitation," The Cambridge Lectures 1989, Les Editions Yvon Blais Inc., Cowanville, (Quebec).

The topic of freedom of expression is as old as organized society itself. Yet, it retains a prominent air of ongoing vibrancy and controversy. Free speech issues have become increasingly pressing in Canada for two reasons.

First, the Canadian Charter of Rights and Freedoms was proclaimed in force in 1982. Charter s. 2(b) enshrined for the first time into Canada's written constitution an explicit guarantee of "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." This provision makes free speech part of the supreme law of Canada[1] so that any law or other government action which unreasonably inhibits these fundamental freedoms is now of no force or effect.[2]

Second, there is among some in Canada a striking ambivalence towards the concept of a fundamental right of free speech. This is exemplified by a comparison of two virtually contemporaneous events in recent history. Salman Rushdie, the author of the novel "Satanic Verses," was the target of a death threat, at the instance of Iran, on account of the views he expressed in writing. In Canada, as elsewhere, outrage was voiced at the suggestion that a government could so terrorize a person because of the ideas which he or she commits to writing in good faith At approximately the same time, University of Western Ontario Professor Phillipe Rushton was the subject of widespread and official condemnation for authoring studies which purported to scientifically rank certain races, including blacks whites and orientals, in order of their intelligence. Denunciation included calls that Rushton's tenure and his research grants be officially terminated. At the same time as Rushdie's right to express himself was advocated, Rushton's was condemned.

The Rushdie/Rushton dilemma brings into sharp focus the question: to what extent can freedom of expression be justifiably limited in a free and democratic society? To answer this question, it is essential to evolve manageable and coherent principles which do not simply draw the line between permissible and prohibited speech at the point which divides speech which we like from speech which we do not. Line-drawing in the area of human expression is inherently risky, because it potentially enables courts to become society's political, social and artistic censor boards. Accordingly, any judicial power to delineate the scope of, and permissible limits on freedom of expression must be exercised sparingly, cautiously and with intense sensitivity for its inherent dangers.

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1 see *Constitution Act 1982*, s. 52(1).

2 *Ibid.*

It is axiomatic that freedom of expression is critically important in a democratic society. It is by no accident that this freedom is set out in the *Charter* in section 2, the first *Charter* provision which enumerates constitutional rights, any more than it is pure coincidence that freedom of speech and press are guaranteed in the First Amendment to the U.S. Constitution, the first provision of the American Bill of Rights. Yet, grand proclamations of free expression's importance alone provide no assurance that this liberty will be adequately safeguarded.

There is no better indication of the risk that freedom of expression can be limited too hastily, at the expense of both society and the individual, than by reference to the maxim which is mot frequently proffered to justify a restriction on that right. When specific speech restrictions are challenged, it is often said in their defence that free speech is not an absolute right, since you cannot cry fire in a crowded theatre. This defence suffers from two critical flaws.

First, as it is commonly rendered, this is a misquotation. In the famous case of *Schenck v. U.S.*[3], U.S. Supreme Court Justice Oliver Wendell Holmes did not prohibit the crying of "Fire" in a crowded theatre. Rather he stated that: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[4] There is a critical difference between this actual quotation on the one hand and the inaccurate form in which it is usually rendered, on the other. There is nothing wrong with crying "fire" in a crowded theatre, if there is indeed a fire there. To the contrary there is compelling reason to laud one who truthfully cries fire in such a situation. The misquotation of Holmes demonstrates the danger of leaping too quickly to the defence of a speech restriction, by sweeping within a limitation's justification both speech which endangers lives (which we should prohibit) and spcech which saves lives (which we must foster).

Second, it does not follow from the fact that freedom of expression is not an absolute right that *any* limitation on this liberty is *ipso facto* justified. Each limit on expressive freedom must be tested individually, while retaining a healthy scepticism about the restriction's necessity, and a cautious fear about the high stakes that are wagered when free speech is put on the table.

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This book has been prepared as an aid for courses on freedom of expression. It is intended to provide the reader with an overview of many of the key free expression and press issues which have arisen, and are likcly to arise, in Canada since the enactment of the *Canadian Charter of Rights and Freedoms*. These issues will be of compelling importance to courts which are called upon to intcrpret the *Charter*, to legislators who are obliged to take the *Charter* into account when voting on new bills, to government officials whose conduct can be questioned under the *Charter*, to the organized mass media which are daily involved in the information-gathering and dissemination business, and to members of the public, whose rights and interests are ultimately at

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3 249 U.S. 47 (1919).

4 *Ibid.*, p. 52 (emphasis added).

stake in any free expression claims, and in any *Charter* s. 1 "reasonable limits" defence.

The first chapters of these materials are intended to address the key background and foundations which are needed to tackle specific free speech questions. The first chapter provides an overview of the general principles of *Charter* interpretation which have been laid down by the courts, and which govern *Charter* s. 2 (b) claims, as well as all other claims under the *Charter*. The second chapter surveys the purposes which freedom of expression can serve -- purposes which repeatedly come into play in free speech analysis. The third chapter reviews some of the key features of pre-*Charter* Canadian law pertaining to freedom of expression. This provides a historical background to the *Charter*, and a doctrinal context within which Canadian judges began their exploration of *Charter* principles.

The fourth chapter outlines leading cases and doctrines which have emerged under the U.S. Constitution's free speech and press clauses of the First Amendment. Throughout these materials, First Amendment jurisprudence is set out for several purposes. It provides a potential source for ideas and doctrines in evolving Canada's approach to a constitutional guarantee of freedom of expression. Second, it can provide examples of doctrinal pitfalls which Canada may wish to avoid. Third, it often provides illustrations of challenging fact situations, from which doctrinal debates can readily emerge. Finally, American constitutional jurisprudence has already influenced *Charter* interpretation to a substantial degree. Terms like "overbroad," "clear and present danger," and "least restrictive alternative" have all found their way into *Charter* jurisprudence in general, and section 2(b) case law in particular. It is helpful to know the source of these concepts, to examine their comparative meanings in the Canadian and American contexts, and to question to what extent their importation into Canada is a good or bad thing.

On the basis of these introductory materials, attention turns in the fifth chapter to the specific content of *Charter* s. 2(b). That chapter reviews the Supreme Court of Canada's major pronouncements to date on the meaning of freedom of expression, and explores the question whether and when free expression challenges should proceed to the justification stage of analysis under s. 1. The balance of the chapters proceed to each consider specific expression issues and topics, ranging from pornography and hate propaganda to claims of constitutional rights of the public to attend court proceedings, or of civil servants to be able to speak out on current political topics. Some of these subjects have already secured extensive judicial attention in Canada, while others, while ripe for litigation, have yet to be the subject of extensive authoritative pronouncements by Canada's courts.

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This Casebook

The revised edition of this casebook is largely based on the original work which was jointly prepared by myself, Professor Jamie Cameron of Osgoode Hall Law School, and Chris Bredt. While significant portions of the original contributions of Professor Cameron and Mr. Bredt are present in these materials, full responsibility (or blame) for revisions and additions is mine.

Acknowledgements
I wish to acknowledge my indebtedness and profound thanks for the assistance of my research assistant on this sixth edition of this casebook, Mr. Jacob Weinrib. He, along with those who assisted with previous editions, Ian Peach, Eddie Taylor and Nancy Park Taylor (no relation) were extremely helpful in bringing this project to completion. Any errors in judgment in the presentation of these materials are solely mine, not theirs. As of this edition, this casebook is now up to date as of mid 2008.

Note: M. David Lepofsky is counsel with the Criminal Law Division, Ontario Ministry of the Attorney General. The material in this casebook has been written in his personal capacity and does not purport to represent the views of the Attorney General or the Ministry.

1. INTRODUCTION

This chapter provides an overview of the basic principles of **Charter** interpretation which have been enunciated by the Supreme Court of Canada. It provides a backdrop for the balance of the book, which reviews the application of these principles to issues pertaining to freedom of expression. While many of these principles may seem familiar from a course on introductory constitutional law, they are in fact more complex than they first seem. For example, the test for justifying a **Charter** infringement under s. 1 is continually evolving. Although the original formulation of the s. 1 test in the Oakes case is still repeatedly cited in judgements, subsequent judicial pronouncements on its application make the original Oakes formulation less clear than it originally seemed to be.

2. BASIC APPROACH TO CHARTER INTERPRETATION -- THE ROLE OF THE COURTS

Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357

ESTEY J.:-- ...

There are some simple but important considerations which guide a court in construing the **Charter**, and which are more sharply focused and discernible than in the case of the federal **Bill of Rights**. The **Charter** comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian law. Indeed, it "is the supreme law of Canada": s. 52, **Constitution Act, 1982**. It cannot be readily amended. The fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch. Flexibility must be balanced with certainty. The future must, to the extent foreseeably possible, be accommodated in the present. The **Charter** is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves. All this has long been with us in the process of developing the institutions of government under the **B.N.A. Act, 1867** (now the **Constitution Act, 1867**). With the **Constitution Act, 1982** comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the court. [at 366-7].

1. INTRODUCTION

The question presented in this chapter is: to what extent did Canadians enjoy constitutional protection for freedom of expression prior to the enactment of the **Charter**? This question is of importance for more than simply historical reasons. To understand what **Charter** s. 2(b) means, it is necessary to examine what protection existed for speech and press freedom prior to its enactment. It is also important to consider what Canadian courts had to say about the idea of free speech, and to examine what importance they attached to this value before the **Charter**, as a backdrop to any evaluation of their treatment of this right under the **Charter**.

The view has been expressed on several occasions that Canadian courts have always treasured free speech, and acted as vigorously as their jurisdiction allowed before the **Charter** to protect expressive freedom. For example, Professor Peter Hogg has written in his book, Constitutional Law of Canada (2nd ed., 1985), at p. 713:

> Canadian judges have always placed a high value on freedom of expression as an element of parliamentary democracy and have sought to protect it with the limited tools that were at their disposal before the adoption of the **Charter of Rights**.

As well, in its **Charter** ruling in R.W.D.S.U. v. Dolphin Delivery, [1986] 2 S.C.R. 573, McIntyre J. stated: "Prior to the adoption of the **Charter**, freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy. Indeed, this Court may be said to have given it constitutional status." This view has been repeated on a number of occasions in subsequent Supreme Court decisions, as will be seen throughout the materials in this book. To what extent are these descriptions accurate? What implications flow from this view for **Charter** analysis?

2. IMPLIED BILL OF RIGHTS JURISPRUDENCE

For several decades, it had been argued by some that the **British North America Act, 1867,** now the **Constitution Act, 1867**, included an "implied bill of rights" rooted in the Act's pre-amble, which declared Canada to have a constitution "similar in principle" to that of the United Kingdom. To what extent does the following case law support a claim that the Canadian Constitution guaranteed a constitutional right to freedom of expression prior to the **Charter**?

Parliament or Legislature, as has been done fore example in the First Amendment to the United States Constitution, the right is subject to curtailment by valid statute law. ...

The freedom of expression with which the Court is here concerned of course has nothing to do with the elective process and the operations of our democratic institutions, the House of Commons and the provincial Legislature. We are indeed speaking about the right of economic free speech, the right to commercial advertising. it can hardly be contended that the province by proper legislation could not regulate the ethical, moral and financial aspects of a trade or profession within its boundaries. [at 362-4].

Notes and Questions

1. Taken together, what protection for freedom of expression are provided by the Alberta Press case, Saumur, Switzman, and Boucher? Is this protection constitutional in character?

2. Does it protect all expression or only certain kinds of expression?

3. Are there limits on freedom of expression which could be justified under this case law?

4. According to this case law, what are the purposes served by freedom of expression?

5. After Dupond, McNeil and Jabour, what is left of the implied bill of rights free speech doctrine?

6. In the absence of an express bill of rights, is it appropriate for courts to imply constitutional protection for freedom of expression? Were there other tools available for courts to protect this value, short of an implied constitutional right? Were these tools used extensively by courts?

3. THE CANADIAN BILL OF RIGHTS

In 1960, Parliament enacted the **Canadian Bill of Rights**, which provided in material part as follows:

> The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;
>
> Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;
>
> And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:
>
> THEREFORE Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: ...
>
> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, ...
> (d) freedom of speech; ...
> (f) freedom of the press.
>
> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared... (the section goes on to enumerate the various legal rights protected by the Bill)
>
> 5. (1) Nothing in Part I [the substantive rights-bearing section of the Bill] shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

Initially, this statute held out great promise for the protection of civil liberties in Canada (see R. v. Drybones, [1970] S.C.R. 282). However, in a series of cases, the Supreme Court of

Canada held that the Bill's guarantees were, in effect, to be narrowly applied, and generally would not be invoked to displace democratically-enacted legislation (see e.g. A.-G. Canada v. Lavelle, [1974] S.C.R. 1349; Curr v. the Queen, [1972] S.C.R. 889). Ironically, it was only after the **Charter**'s enactment that there was some sign from the Supreme Court that the **Canadian Bill of Rights** might have some real potency (see Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177).

Within this framework, the free speech and press clauses of the **Canadian Bill of Rights** received only minimal judicial attention and application. See e.g. CKOY Ltd. v. The Queen (1978), 90 D.L.R. (3d) 1 ; SOLOSKY v. THE QUEEN (1979) 50 C.C.C. (2d) 495. R. v. Prairie Schooner News Ltd., (1970) C.C.C. (2d) 251.

Notes and Questions

1. In light of the enactment of the **Canadian Bill of Rights**, would it have been appropriate for the courts to give greater force to the implied bill of rights jurisprudence in the 1960s and 1970s?

2. With the enactment of the **Charter**, should the **Bill of Rights** be given short shrift, or should it be revitalized?

3. In Ford v. Quebec, [1988] 2 S.C.R. 712, the Supreme Court of Canada struck down Quebec's law requiring commercial signs to be in French only. It did so relying both on **Charter** s. 2(b) and the free speech provision of the Quebec **Charter of Human Rights and Freedoms**. That section provides as follows:

> **3.** Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association. ...
>
> **9.1.** In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Quebec.

The court did not make reference to the fact that this provincial charter was analogous to the **Canadian Bill of Rights**, nor did it attempt to rationalize the different force which the Supreme Court gave the **Canadian Bill of Rights**, as contrasted with the Quebec Charter.

4. The Supreme Court of Canada has generally held that **Canadian Bill of Rights** jurisprudence is not controlling when interpreting the **Charter**, and that a **Charter** provision may be given greater force than a comparably-worded section in the **Canadian Bill of Rights**. See e.g. R. v. Therens, [1985] 1 S.C.R. 613; Reference Re s. 94 of the B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486.

5. In contrast to the Supreme Court's narrow application of the **Canadian Bill of Rights**, based on concerns about parliamentary sovereignty, it has held that human rights codes are fundamental laws, which are not quite constitutional, but more significant than the ordinary statute. It has held that anti-discrimination statutes are paramount over other legislation, even if the human rights code does not include an explicit paramountcy or primacy clause. See Ontario Human Rights Commission v. Simpson-Sears, [1985] 2 S.C.R. 536 and the authorities cited therein. Is there a principled reason why courts should treat human rights legislation as paramount over conflicting laws, while being hesitant to give comparable treatment to the **Canadian Bill of Rights**?

1. INTRODUCTION

The question presented in this chapter is as follows: what purposes or functions are served by freedom of expression, including freedom of the press and other media of communication, as guaranteed by s. 2(b) of the Charter? This is the most fundamental, and perhaps the most vexing of the questions presented in these materials. Its resolution is central to the formulation of a coherent and principled approach to s. 2(b).

As a matter of abstract principle, we tend to assume that expressive activity is intrinsically valuable. From that perspective, it may not seem problematic to give expressive activity a special immunity from regulation. However, even in advance of any effort at tackling specific free speech topics, the very task of identifying the purposes for this freedom plunge us into fundamental questions, the answers to which are neither easy nor uncontroversial. Most of us would concede that expressed views can be offensive, odious or harmful. When confronted with that reality, we are forced to reconsider the assumption that expressive activity is per se valuable. Expressive freedom may be valuable in the abstract; does it necessarily follow, however, that it should automatically be protected by the Charter?

The Supreme Court of Canada has required a rigorous inquiry into the purposes served by freedom of expression. The court held in Hunter v. Southam,[1984] 2 S.C.R. 145 that the **Charter** is itself a purposive document, and that its rights are to be given a purposive interpretation. A purposive approach to a **Charter** right has twin components. First, the right must be interpreted in a sufficiently liberal fashion that it achieves its purposes. Second, the right should not be so inflated as to overshoot its purposes (R. v. Big M Drug Mart Ltd., at 344).

2. LEARNED COMMENTARIES ON THE PURPOSES FOR FREEDOM OF EXPRESSION

John Stuart Mill; On Liberty; (Middlesex: Penguin Books, 1985)

We have now recognized the necessity to the mental well-being of mankind (on which all their other well-being depends) of freedom of opinion, and freedom of the expression of opinion, on four distinct grounds, which we will now briefly recapitulate:

First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.

can play in guarding against breaches of trust by public officials. Indeed, if one had to identify the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment, this checking value would be the most likely candidate. Of course, the fact that many of the framers saw the free-expression guarantee primarily as a check on government does not compel us to give that value a central place in contemporary analysis. But when a value that was important in the original process of adoption seems also to loom large in a clause's recent impact on the society, there is good reason to inquire whether that value should not figure prominently in the contemporary theory of the clause. This is particularly true when traditional theories emphasize other values and appear not to be serving the Court adequately in its efforts to process some of the more important claims currently being presses in the name of the clause.

Notes and Questions

1. How does one discover a constitutional right's purposes? What sources may properly be considered? Are there any sources which should be omitted?

2. What assumptions are made about humankind and human nature in the following discussions about the purposes of free expression? Are these assumptions articulated?

3. Are American deliberations on the purposes for freedom of expression relevant in Canada? Is freedom of expression a transcendant, international norm, or does it admit of local diversity?

4. Are 19th century discussions of freedom of expression relevant in the late 20th Century?

5. How does one separate out the content of freedom of expression from the purposes of freedom of expression?

3. THE HOLMES CORRESPONDENCE

The following readings consist of correspondence exchanged between Oliver Wendell Holmes, Jr. (U.S. Supreme Court, 1901-1930), and Learned Hand (federal judge, S.D.N.Y. and renowned legal scholar), and Holmes and Harold Laski (a British legal scholar). These letters were written during World War I, when the first amendment jurisprudence began to evolve. They address the tension between the instinct that expressive activity is unique and the indisputable fact that speech can be just as harmful as conduct.

Given the evolution of first amendment doctrine and advent of s.2(b), the issue may seem academic at this point in time. Although Holmes's doubts may therefore seem dated, they raise important questions about the nature of expressive activity, and the special status it receives under both Constitutions.

Sincerely Yours
O.W. Holmes

Letter
Oliver Wendell Homes to Harold Laski, July 7, 1918

Dear Laski:

Just a line to say that I don't see where your quarrel with Hand is. It rather should be with me if either--but I don't see any quarrel. My thesis would be (1) if you are cocksure, and (2) if you want it very much, and (3) if you have no doubt of your power--you will do what you believe efficient to bring about what you want--by legislation or otherwise.

In most matters of belief we are not cocksure--we don't care very much--and we are not certain of our power. But in the opposite case we should deal with the act of speech as we deal with any other overt act that we don't like.

To be continued on Friday.

Aff'ly, O.W.H.

We are so glad your wife can come.

Notes and Questions

1. Hand's opinion in Masses identifies "direct incitement or advocacy" as the relevant standard of justification. The discussion in his letter to Holmes on June 22, 1918 is more philosophical. What argument does he make? Does Hand appear to believe that speech is intrinsically valuable? If not, why does he claim it should be protected? Does Hand provide any criteria for resolving concrete constitutional issues? If not, what contribution does an abstract argument of this nature make?

2. What kind of a response is Holmes's statement that "free speech stands no differently than freedom from vaccination"? [see letter of June 24, 1918]. There he is referring to Jacobson v. Massachusetts, 197 U.S. 11 (1905), which held that "liberty" in the fourteenth amendment's due process clause does not include the right to be free from compulsory vaccination. What is his point in claiming a connection between speech and vaccination?

Note that in Lochner v. New York, 98 U.S. 45 (1905), a majority of the Court invalidated

legislation limiting the hours of work of bakers, on the ground that such a provision unconstitutionally denied individuals their "liberty of contract" under the due process clause. Holmes stated in dissent that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics". By that he meant that the Constitution does not favour any one social, political or economic theory and therefore, that the Court lacked the authority to deny a legislative majority its prerogative to ameliorate the undesirable consequences of an economic system based on laissez-faire values. Presumably, he would agree that, similarly, the first amendment does not entrench Marxism, or communism, or anarchism. If that is so, would such an argument support or undercut the views he expresses in these letters?

3. Does Hand ever respond to Holmes's assertion that speech cannot be distinguished from conduct, particularly the suggestion that "we should deal with the act of speech as we deal with any other overt act we don't like" [letter to Laski, July 7, 1918]?

4. Given virtually universal agreement that expressive freedom should be protected by the Constitution [whether under the first amendment or s.2(b)], the Hand-Holmes-Laski exchange may seem dated. The issue remains relevant because a double standard applies in a variety of cases concerning the speech-conduct distinction. See infra Chapter IV.

5. Subsequently, in Schenck v. United States, 249 U.S. 47 (1919), Holmes introduced the concept of clear and present danger:

> The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic. [The] question in every case is whether the words used were used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

Despite that language, he upheld the convictions in Schenck, and declined to invoke the language of clear and present danger in two companion cases: see Frohwerk v. United States, 249 U.S. 204; and Debs v. United States, 249 U.S. 211. Only a few months later, however, he invoked Schenck to support a speech-protective interpretation of the first amendment in his dissenting opinion in Abrams v. United States, infra.

cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the [Constitution].

Notes and Questions

1. What does Holmes mean in saying that "[p]ersecution for the expression of opinions seems to me perfectly logical"? As far as he is concerned, why is "opposition by speech" ever allowed? Given the proposition that legislative majorities are entitled to pursue the ideas they believe in, why then does he suggest that "the ultimate good is better reached by free trade in ideas"?

2. When Holmes refers to "the theory of our Constitution", what is he talking about? Is that theory any different than the theory represented by Herbert Spencer's "social statics"? Why or why not?

3. Thinking back to the Holmes-Hand-Laski correspondence, can you explain how Holmes arrived at the dissenting opinion in Abrams after expressing so much scepticism in those letters?

4. What assumptions does the marketplace theory rest on? Do any of them seem flawed? If the answer is yes, does that suggest that Holmes's theory is unsound? Should it be abandoned, refined, or otherwise taken at face value?

5. What are the constituent elements of a marketplace of ideas? To be effective, must the "marketplace" be perfectly competitive? Can this marketplace work if the means for communication to large audience are controlled by a small number of large corporations?

6. How far can this "marketplace" metaphor be stretched in the free speech context? Is it a helpful analogy, a convenient illustration, or a firm foundation for constructing legal doctrines?

preamble of the [BNA Act] our constitution is and will remain, unless radically changed, "similar in principle to that of the United Kingdom." At the time of Confederation, the United Kingdom was a democracy. Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law. ... Every inhabitant in Alberta is also a citizen of the Dominion. The province may deal with his property and civil rights of a local and private nature within the province; but the province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public concern. The mandatory and prohibitory provisions of the Press Bill are, in my opinion, ultra vires of the provincial legislature. They interfere with the free working of the political organization of the Dominion. They have a tendency to nullify the political rights of the inhabitants of Alberta, as citizens of Canada, and cannot be considered as dealing with matters purely private and local in that province. The federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion. ... These subjects were matters of criminal law before Confederation, have been recognized by Parliament as criminal matters and have been expressly dealt with by the criminal code. No province has the power to reduce in that province the political rights of its citizens as compared with those enjoyed by the citizens of other provinces of Canada. Moreover, citizens outside the province of Alberta have a vital interest in having full information and comment, favourable and unfavourable, regarding the policy of the Alberta government and concerning events in that province which would, in the ordinary course, be the subject of Alberta newspapers' news items and articles.

Notes and Questions

1. For many years, Holmes's marketplace of ideas was accepted as dogma. After the court crisis, the status of the first amendment was further entrenched by Justice Cardozo's statement that free speech is "the matrix, the indispensable condition, of nearly every other form of freedom" [Palko v. Connecticut, 302 U.S. 319 at 327 (1937)], and the Roosevelt Court's theory of "preferred freedoms".

Although the "marketplace" concept was introduced in a case involving seditious speech, it did not single political expression out for unique or exclusive constitutional protection. The connection between expressive freedom and democratic process would not be emphasized until Alexander Meiklejohn's 1948 treatise, Free Speech and its Relation to Self-Government. Subsequently, in an influential article, Robert Bork made the argument that the first amendment should only protect political expression. See "Neutral Principles and Some First Amendment Problems", 47 Ind. L.J. 1 (1971). That view has not won widespread support.

2. Can a stronger argument along those lines be made in Canada? See Re Klein and L.S.U.C. (1985), 50 O.R. (2d) 118 (H.C.) Would an interpretation of s.2(b) that emphasized the importance of expressive freedom in a parliamentary system be inconsistent with our constitutional tradition? Would it be inappropriate to restrict the scope of s.2(b) to political expression? Why or why not?

3. If you reject a restrictive interpretation of s.2(b), does it necessarily follow that all forms of speech must be considered equally valuable? If all expression is equal, how do you explain the special status of political expression in the pre-Charter jurisprudence? Alternatively, do you think the Charter should recognize a "hierarchy" of s.2(b) values? If your answer is yes, can you suggest how the courts might draw distinctions between political, commercial, artistic, and cultural expression etc.?

4. Define "political expression".

5. Assume that Charter s. 2(b) were held to only extend constitutional protection to political expression. Assume further that a legislature passed a law which provides as follows:

(1) No person shall engage in any expressive activity which is not political expression, protected by the Charter of Rights.
(2) Anyone who contravenes section (1) is guilty of an offence, and is liable for a fine of $1,000 or imprisonment for 6 months.
(3) This provision only applies within the legislative jurisdiction of this legislature.

Would this provision be constitutional?

6. Does recognition of "individual self-fulfilment" as an underlying value of the first amendment or s.2(b) of the Charter preclude definitional restrictions on the scope of the right? Surely communicative activity is inherently "self-fulfilling". Are definitional restrictions on the scope of s.2(b) consistent with this rationale?

7. Are there any adverse consequences in rejecting this rationale? For example, what would the status of artistic expression be?

8. What function do the underlying values of expressive freedom serve under the Charter? Do they delineate the scope of s.2(b)? If not, what other role could they play?

Notes and Questions

1. Is McIntyre's approach to s.2(b) in Dolphin comprehensive? Which of the traditional first amendment rationales are endorsed, emphasized or ignored?

2. Is picketing political expression, expression that serves the marketplace function, or expression that is directed at self-realization [i.e., achieving compensation commensurate with the value of an individual's work]? Is it necessary to choose between the three? Why or why not?

3. Does McIntyre consider some rationales more important than others? If not, should he have? If he does, does he indicate his reasons for doing so?

4. What purposes for free expression are recognized in Ford? Does Ford add anything to Dolphin in this context?

5. When taken together, do Dolphin and Ford fail to recognize any purposes which freedom of expression serves?

6. Is it sufficient for Ford to recite these purposes for freedom of expression, without providing any discourse on how and why it arrived at them?

7. In the **Charter**'s earliest days, the Supreme Court can be seen here trying to enunciate broad principles which will effect jurisprudence for a long time in this area. Is it appropriate for the court to speak in such categorical terms, at a point in time when it is not yet confronted with the full spectrum of free expression issues which are to come? Why or why not?

R. v. Keegstra [1996] 1 S.C.R. 458, Supreme Court of Canada, Per McLachlin, J., dissenting

A. A Philosophical View of Freedom of Expression and the Charter

Various philosophical justifications exist for freedom of expression. Some of these posit free expression as a means to other ends. Others see freedom of expression as an end in itself.

Salient among the justifications for free expression in the first category is the postulate that the freedom is instrumental in promoting the free flow of ideas essential to political democracy and the functioning of democratic institutions. This is sometimes referred to as the political process

1. INTRODUCTION

The purpose of this chapter is to provide an introduction to the jurisprudence under the First Amendment to the U.S. Constitution as it relates to the free speech and press clauses.

The First Amendment provides as follows:

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Throughout these materials, First Amendment jurisprudence pertaining to specific free expression topics is set out. This introductory overview will assist in the reading of the chapters that follow, by introducing the basic doctrines which have evolved under the First Amendment, and the juristic vocabulary that is frequently employed.

2. INTRODUCTION TO THE U.S. CONSTITUTION

Law Society of Upper Canada; Public Law Teaching Materials -- Bar Admission Course, 1988-89, Chapter 19: "Litigating Charter Claims: Legal, Factual and Evidentiary Ammunition"

First, since the American system of government, like the Canadian, is a federal one, there are two regimes of law: federal law and state law. The U.S. Constitution, although often referred to as the "federal constitution," is the supreme law of the United States. It binds federal, state and local governments vis-a-vis all of their actions.

Originally, the U.S. Bill of Rights was designed to bind only federal government action. When it was enacted as the first ten amendments to the U.S. Constitution at the end of the 18th century, its framers deliberately set out to leave state governments free from review under the U.S. Bill of Rights. Up until the U.S. Civil War, one will find cases dealing only with challenges to federal legislation under the U.S. Bill of Rights.

After the U.S. Civil War in the middle of the 19th century, a series of new amendments to the U.S. Constitution were passed expanding the Bill of Rights. This included, among others, the

14th Amendment, which for the first time purported to place civil libertarian limits on the action of state governments. The "due process clause" of the 14th Amendment has subsequently been construed as incorporating into it the vast majority of the guarantees set out in the first ten amendments. When one reads an American case involving, for example, a complaint that a state government violated the freedom of speech, one will see the claim framed in terms such as these: "This is a challenge to a state film censorship law, in which it is alleged that the law violated the appellant's freedom of speech, guaranteed to him or her by the First Amendment as applied to the state through the 14th Amendment." The reference to the 14th Amendment is only an attempt to invoke the power of the court to review state government activity under the First Amendment. It is not an attempt to raise an independent "due process" type of claim, such as based on lack of a hearing.

When undertaking research in American constitutional law, it is helpful to note that in the U.S., there are two separate and autonomous court systems which operate in tandem. First, there is the "federal court system", with the U.S. Supreme Court at its top. Its judges are federally appointed, and its mandate includes the enforcement of federal law, (including the U.S. Constitution), as well as some state law. Second, each state has its own state court system, whose judges are selected according to state law, and whose job it is to enforce state laws. U.S. Constitutional issues can be litigated both before federal and state courts.

It is also worth noting that supplementing the U.S. Constitution, many states have their own state constitutions. These can incorporate their own bills of rights which bind the particular state. There is a wealth of state constitutional law jurisprudence arising from the interpretation of these state constitutions.

3. USING AMERICAN CONSTITUTIONAL JURISPRUDENCE IN CHARTER CASES

To what extent can U.S. constitutional judgements be employed in legal argument under the **Charter**? Prior to the **Charter**, it was rare to see a Canadian court relying on U.S. jurisprudence generally, and virtually unheard of pre-**Charter** Canadian constitutional adjudication. Indeed, in the opinion of some judges, it was considered inappropriate to use U.S. authorities in interpreting the statutory **Canadian Bill of Rights** (see Hogan v the Queen, [1975] 2 S.C.R. 574).

In contrast, one frequently finds U.S. authorities cited in **Charter** decisions, and even more set forth in the facta of **Charter** litigants. The Supreme Court of Canada has at various times referred to this practice. For example, in Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, Estey J. stated:

> The courts in the United States have had almost two hundred years experience at this task and it is of more than passing interest to those concerned with these new developments in

> Canada to study the experience of the United States courts. [at 367].

On the other hand, in Hunter v. Southam, [1984] 2 S.C.R. 145, Dickson J. (as he then was) had this to say about using American Fourth Amendment law in interpreting s. 8 of the **Charter**:

> In United States v. Rabinowitz, 339 U.S. 56 (1950), the Supreme Court of the United States had held that a search without warrant was not ipso facto unreasonable. Seventeen years later, however, in Katz, Stewart J. concluded that a warrantless search was prima facie "unreasonable" under the Fourth Amendment. The terms of the Fourth Amendment are not identical to those of s. 8 and American decisions can be transplanted to the Canadian context only with the greatest caution. Nevertheless, I would in the present instance respectfully adopt Stewart J.'s formulation as equally applicable to the concept of "unreasonableness" under s. 8, and would require the party seeking to justify a warrantless search to rebut this presumption of unreasonableness. [at 161].

As well, Lamer J., in the Reference re. B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, made the following observation in the context of s.7 of the **Charter**:

> The substantive/procedural dichotomy narrows the issue almost to an all-or-nothing proposition. Moreover, it is largely bound up in the American experience with substantive and procedural due process. It imports into the Canadian context American concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the U.S. Constitution. That Constitution, it must be remembered, has no s. 52 nor has it the internal checks and balances of ss. 1 and 33. We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions. Finally, the dichotomy creates its own set of difficulties by the attempt to distinguish between two concepts whose outer boundaries are not always clear and often tend to overlap. Such difficulties can and should, when possible, be avoided. [at 498].

the requirement of "substantial" overbreadth is construed to mean only that facial review is inappropriate where the likelihood of an impermissible application of the statute is too small to generate a "chilling effect" on protected speech or conduct, then the impact is likely to be small. On the other hand, if today's decision necessitates the drawing of artificial distinctions between protected speech and protected conduct, and if the "chill" on protected conduct is rarely, if ever, found sufficient to require the facial invalidation of an overbroad statute, then the effect could be very grave indeed. In my view,...the preservation and enforcement of the First Amendment guarantees [is crucial].

Notes

1. In a case decided in the United States Supreme Court on June 11, 1993 in a unanimous ruling the Court upheld a Wisconsin law which provided for enhanced sentences for people convicted of hate crimes. Mitchell, a black man, was convicted of assaulting a white man after telling the victim that the assault due to the victim's race. Mitchell challenged the state law claiming it violated his First Amendement rights since the state used evidence of his attitudes toward the victim's race to enhance the sentence.

The U.S. Supreme Court rejected Mitchell's argument.

Chief Justice REHNQUIST delivered the opinion of the Court.

WISCONSIN, Petitioner v. Todd MITCHELL. No. 92-515. Argued April 21, 1993, Decided June 11, 1993

... Finally, there remains to be considered Mitchell's argument that the Wisconsin statute is unconstitutionally overbroad because of its "chilling effect" on free speech. Mitchell argues (and the Wisconsin Supreme Court agreed) that the statute is "overbroad" because evidence of the defendant's prior speech or associations may be used to prove that the defendant intentionally selected his victim on account of the victim's protected status. Consequently, the argument goes, the statute impermissibly chills free expression with respect to such matters by those concerned about the possibility of enhanced sentences if they should in the future commit a criminal offense covered by the statute. We find no merit in this contention.

The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional "overbreadth" cases. We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty-enhancement. To stay within the realm of rationality, we must surely put to one side minor misdemeanor offenses covered by the statute, such

INTRODUCTION

This chapter considers how the words of s.2(b), guaranteeing "freedom of expression", should be interpreted as a general matter. It provides the underpinning for the discussion that follows throughout these materials. It focuses on key themes which are recurrent in free speech jurisprudence. This chapter takes a first look at those basic issues which are revisited throughout the rest of these materials.

Four fundamental questions are inherent in any inquiry into the **Charter**'s constitutional free expression guarantee:

1. What is "expression", and should we invoke a distinction between speech on the one hand, and conduct or action on the other hand, to exclude certain types of activity from s.2(b)?

2. Once a court is satisfied that a communication or activity falls within the definition of "expression", should it draw a further distinction between protected and unprotected expression, in order to exclude activities not considered worthy of the Charter's protection?

3. What is meant by the term "freedom" in s. 2(b)? Does any interference with "expression" ipso facto constitute an infringement or denial of the "freedom" of expression? For example, does freedom in relation to expression include the freedom from state compulsion to say something that you do not wish to say?

4. In the general scheme of the Charter, when is it necessary to resort to s. 1, and when are free expression disputes to be resolved within the four corners of s. 2(b)?

We will begin with the basic principles set out in R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; Ford v. A.G. Quebec [1988] 2 S.C.R. 712; and Irwin Toy Ltd. v. A.-G. Quebec, [1989] 1 S.C.R. 927. We will also take a preliminary look at the early Supreme Court of Canada pronouncements on compelled expression. We will then look to some important U.S. First Amendment cases dealing with comparable issues.

Notes and Questions

1. Although Irwin Toy defines the scope of freedom of expression under s.2(b), the Supreme Court of Canada's discussion of picketing in this case remains important. Read what Justice McIntyre says about the scope of s.2(b) very carefully. Is it clear to you why the Charter would not extend to "threats of violence or acts of violence...the destruction of property, or assaults, or other clearly unlawful conduct"? Is it because the activities listed do not constitute "expression", or is it because such activities, despite being expressive, should not be protected by the Charter? Consider the following comment:

> Despite recognizing picketing as constitutionally protected expression, McIntyre J. was not prepared to agree that s.2(b) protects all picketing. After noting that the purpose of labour picketing is economic, and implying that picketing can often be more "active" than "expressive", he stated that the Charter would not extend to picketing that is accompanied by threats or acts of violence, property destruction, assault, or "other clearly unlawful conduct". [Id. at 588].
>
> Though any suggestion that the Charter might protect violent conduct may be intuitively unsound, it is also conceptually unclear why s.2(b) protects picketing in some cases but not in others. The text of s.2(b) draws no distinction between different types of expression, and McIntyre J. never stated explicitly that picketing loses its character as "expression" when it is violent, potentially violent, or otherwise "unlawful". Moreover, the fact that s.2(b) protects picketing does not mean that picketing can never be restricted. Reasonable limitations are explicitly permitted by s.1. ...
>
> Thus it becomes difficult to understand, in the absence of any explanation for such distinctions, why the Charter protects some kinds of picketing but not others. For example, if picketing is covered because it is "political" expression, then the conclusion that unpeaceful picketing is not protected appears contradictory. However, if unpeaceful picketing is not protected because it is "economic" speech, then the initial decision to protect peaceful picketing is inconsistent with that conclusion. Moreover, if the "act" of picketing is expression, then one wonders why its status under s.2(b) should depend on whether or not it is peaceful. ...

J. Cameron, "The Forgotten Half of Dolphin Delivery: A Comment on the Relationship Between the Substantive Guarantees and Section 1 of the Charter", 22 U.B.C. Law Rev. 147, at 149-50 (1987).

Is it important for the Supreme Court of Canada to identify its reasons for excluding certain activity from s.2(b) more precisely? Why or why not?

2. In Reference re Public Service Employee Relations Act, [1987] 1 S.C.R. 313, Justice McIntyre concluded that s.2(d) does not protect the right to strike. In doing so he quoted the following passage from Professor J.M. Weiler:

> [If s. 2 is given an expansive definition], [s]ome judges might interpret section 1 so aggressively as to [remake] chunks of Canadian law. This might cause the legislators to retaliate by invoking the override. ... Alternatively, the courts might take the opposite tack by giving the legislators too broad an ambit under section 1. In either case, the courts, because of the Charter, will have to enter the legislative sphere. Where rights are specifically guaranteed,...this may on occasion be true. But where no specific right is found, the courts should refrain from intrusion. ...

Do you agree? Should these considerations influence a court in interpreting the **Charter**?

3. Justice McIntyre's definition of freedom of expression would exclude "other clearly unlawful conduct". Is it clearly unlawful to commit a tort? If the answer is yes, then why was the proposed picketing covered under s.2(b)? Would it have been preferable for the Court to have found that no breach occurred? Why or why not?

4. Can the content of the **Charter**'s free expression guarantee be founded in any way on what is clearly unlawful conduct? What impact does such an approach have on s. 52(1) of the Constitution Act 1982, which provides that the Constitution, including the Charter, is supreme over all other laws?

the name of protecting children. These provisions therefore constitute limitations to s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter. They fall to be justified under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter....

Per McIntyre, J., with Beetz, J., concurring, dissenting in part. ... My point of disagreement with my colleagues arises from their answer to the second question. While I agree with them that ss. 248 and 249 of the Consumer Protection Act infringe s. 2(b) of the Canadian Charter of Rights and Freedoms and s. 3 of the Quebec Charter, I do not agree that they may be justified under s. 1 of the Canadian Charter or s. 9(1) of the Quebec Charter. I would not wish in these reasons to attempt to set out the limits of the application of s. 2(b) of the Charter and to define in general terms the extent of the protected activity under s. 2(b). I would content myself by observing that this Court in Attorney General of Quebec v. Chaussure Brown's Inc. et al. [1988] 2 S.C.R. 712, (referred to elsewhere as Ford v. A.G. Quebec) has held that commercial expression has the protection of s. 2(b). At pp. 766-67, it was said:

> Given the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian Charter should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the Charter. ...

It is evident then that ss. 248 and 249 of the Consumer Protection Act restrict forms of expression which fall within the protection of s. 2(b). Since I agree that the two sections in their prohibition of advertising aimed at children infringe the s. 2(b) right, the only question in issue is whether the sections can be justified as reasonable limits under s. 1 of the Charter....
(The discussions of s. 1 are omitted.)

Notes And Questions

1. What portions of the majority remarks on the content of s. 2(b) are ratio decidendi and what portions if any are obiter dicta?

2. Was it appropriate for the court to endeavour to formulate a test for s. 2(b)? Is it possible to formulate a comprehensive test?

3. If it is appropriate to formulate a s. 2(b) test, was Irwin Toy the right case for the court to do so? Was 1989 the right year? What are the advantages and disadvantages of enunciating a formula earlier versus later?

4. Turning to the substance of the Irwin Toy test, does this formulation make sense?

5. Are any portions of the Irwin Toy approach comparable to features in the First Amendment jurisprudence? If so, which features?

6. Do the examples given in the majority judgement fit the principles laid down there?

7. Setting aside Irwin Toy, try to draft a brief formulation of a s. 2(b) test. What problems do you encounter in doing so, if any?

8. Irwin Toy involved a corporation claiming to have the constitutional right to direct mass advertising at children under the age of 13. What role did this factual context play in the court's formulation of s. 2(b) principles? To what extent does the specific Irwin Toy claim fit within the jurisprudential approach that the court enunciates in this case?

9. Examine closely the majority's listing of the purposes for s. 2(b). Does this list include all the lofty aims which have been identified to date, either in prior Supreme Court cases, or in the learned writings which the court cites with approval?

10. Irwin Toy advances a definition of "expression" that may seem to be "literal", then adds a series of qualifications or exclusionary criteria. Does the Court offer any vision or theory of expressive freedom to explain this framework? Otherwise, how does the majority opinion rationalize the distinctions it draws between protected and unprotected activity?

11. Can you explain why certain activities are excluded from s.2(b) in Irwin Toy: is it because they are not "expressive" in nature, or is it because they are not protected by the **Charter**, despite their possible literal status as expression? Does it matter whether the Court excludes "violent forms of expression" as "conduct" rather than as "unprotected" types of expressive activity?

12. How would you rationalize the exclusion of activity which is undeniably expressive [in the literal sense] from s.2(b)? Analytically, what issue do those rationales address: the definition of expression itself [i.e., the preliminary issue of breach]; or the permissibility of limits on that freedom [i.e., the ultimate question of justification]? Do definitional restrictions on the scope of s.2(b) undermine s.1, and the justificatory function it was intended to serve? Is there a difference in constitutional principle between "defining" s. 2(b) at the s. 2(b) stage of the analysis on the one hand, and "limiting" s. 2(b) rights under s. 1 on the other?

13. How does the purpose-effect distinction from Big M affect the Court's definition of expression as any attempt to convey meaning? Should the state's purpose be considered relevant

in determining the existence of a breach? Why or why not?

14. For a comment on this decision see, J. Cameron, "The Original Conception of Section 1 and its Demise: A Comment on Irwin Toy Ltd. v. A-G of Quebec", 35 McGill L.J. 253 (1989). In Irwin Toy, the court speaks of a law having a purpose to abridge freedom of expression. Whose "purpose" is determinative? That of the government proposing a statute? That of the cabinet minister, introducing the bill? That of all of the legislators voting on the bill? How is this "purpose" proven.

15. Why should a law or other government action be found to contravene s. 2(b) simply because its purpose was so intended, if it turns out in fact that the law or government action did not have any adverse effect on freedom of expression?

16. In Ford, the court found that one's choice of language is intimately bound up with the content of speech. Does this extend to one's choice of words, within a language? Does freedom of expression include a prima facie constitutional right to use profanities?

17. To what extent does s. 2(b) extend rights to listeners, as distinct from speakers? Do Irwin or Ford provide a useful consideration of this question?

18. In R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, the Supreme Court of Canada considered whether an Ontario statute, requiring retail stores to close on Sunday, infringed the freedom of religion of Saturday Sabbatarians. In addressing **Charter** s. 2(a)'s freedom of religion clause, Chief Justice Dickson defined "freedom" as the absence of coercion or constraint. Is this applicable to s. 2(b)? What does it mean?

19. After defining "expression" as the attempt to convey meaning, the Supreme Court of Canada added a series of qualifications. The first, which would exclude "violent forms of expression", is based on a distinction between the form and content of an expressive activity. What is a violent form of expression? How do we distinguish between the content of expression and the form of expression? Would some of the statements made by Saddam Hussein, or of those participating in any of the native blockades be considered a violent form of expression?

Can words themselves be inherently violent? Is "violence" an abstract concept? Should every expressive activity that either indirectly or impliedly endorses any form of violence, present or future, be excluded from s.2(b) of the **Charter**? As a matter of factual distinction, how would you define what is violent? For example, is a jacket which says "Fuck the draft" a violent form of expression?

20. U.S. supreme Court Justiee Holmes once said, "[e]very idea is an incitement." [Gitlow v. New York, 268 U.S. 652). In terms of the scope of s.2(b), what does that observation suggest?

If the Court only intended to exclude expressive activities which are indistinguishable from violent acts themselves [i.e., an act of theft or rape], such acts would probably fall outside its initial definition of expression in any event. If pure acts are outside s.2(b), whether violent or not, was there any need to add a qualification for "violent forms"?

21. Though it is unelear, the Irwin Toy Court appeared to contemplate that some activities which are expressive may nonetheless be so violent as to forfeit the protection of s.2(b). Does the Court provide a rationale for excluding violent expressive activities from s.2(b)? Is its eonelusion self-evident? Or is the violence which accompanies an expressive aetivity a faetor that would justify a limitation under s.1, rather than a finding that no breaeh of s.2(b) had occurred?

22. In addition, the Court stated that a breach of s.2(b) would not occur in cases where a regulation was directed at the "physical consequences", rather than at the expression itself. What does this qualification mean? Are restrietions on tobacco advertising directed at the physical consequences of the expression, or at the expression itself? By banning newspaper vending boxes from its streets, was the City of Victoria simply attempting to avoid an undesirable physical eonsequence [i.e., clutter]? Do these examples fall within the Court's qualification for physieal consequenees? If they do you have any diffieulty with a eonelusion that these prohibitions do not constitute a violation of s.2(b)? Otherwise, is the Court's exeeption for "physical consequenees" more limited in its scope, to the subsequent consequences of expressive aetivity [i.e., the act of buying tobacco in response to an ad], as distinct and separate from the expressive activity itself? Once again, however, if this exeeption should be restricted to subsequent pure eonduct, then there was no need to add the qualification (because sueh eonduct would not eonstitute an attempt to convey meaning).

23. Is street begging an activity proteeted by Charter s. 2(b)? Assume that a municipality banned begging in public streets or on subway platforms, to eliminate the alleged harassment or nuisance posed by beggars to passers-by. Would this law eontravene s. 2(b)? If so, could it be saved by charter s. 1?

24. Peaee demonstrators erect a peace camp on Parliament Hill in Ottawa. Eventually, government offieials demand that the camp be dismantled. Has the freedom of expression of the eampers been infringed? What must they prove to get their foot in the s. 2(b) door? If there is a s. 2(b) breach, ean it be saved under Charter s. 1?

In the pre-Irwin Toy ease of **Weisfeld v. Canada, (1989), 42 C.R.R. 238 (F.C.T.D.)**, the

Consider the facts of this particular case. The letter was tightly and carefully designed to reflect only a very narrow range of facts which, we saw, were not really contested. As already discussed, unlike in National Bank, supra, the employer has not been forced to state opinions...which are not its own. Rather, the negative order seeks to prevent the employer from passing on an opinion, such prohibition being closely tied to the history of abuse of power which had been found to exist. Furthermore, that prohibition is very circumscribed. Firstly, it is triggered only in cases when the appellant is contacted for a reference and, secondly, there is no requirement to send the letter to anyone other than prospective employers. ...

Finally, it cannot be ignored that a letter such as this may not have a great beneficial impact on an employee's job hunt. The letter is very neutral in tone, totally unembellished as it is by any opinion customary in letters of reference, and it refers to the fact of the finding of unjust dismissal. It seems to me that the adjudicator went no further than was necessary to achieve the objective and, even then, the measures adopted by the adjudicator cannot be said to have done more than to have enhanced, as opposed to having ensured, the chances of the respondent finding a job. The adjudicator did not in any sense pursue the objective without regard to the appellant's right to free expression. ...

It is so clear to me that the effects of the measures are not so deleterious as to outweigh the objective of the measures. The importance of the above-discussed objective cannot be overemphasized. There are many diverse values that deserve protection in a free and democratic society such as that of Canada, only some of which are expressly provided for in the **Charter**. ...

In normal course, the suppression of one's right to express an opinion about a subject or person will be a serious infringement of s. 2(b) and only outweighed by very important objectives. In the foregoing analysis, I have sought to show that the negative order was minimally intrusive in a relative sense and also that the careful tailoring of both parts of the order has made this a much less serious infringement of s. 2(b) than, for instance, occurred in the National Bank case.

Notes and Questions

1. A theme which resurfaces from time to time in these materials is the extent to which compelled speech constitutes an abridgement of freedom of expression. Is there anything different in principle or in practice between the state's forcing you to say something that you do not believe, and the state's preventing you from saying something that you do believe, and the state forbidding you to say something that you do not believe?

2. Should the s. 1 test differ in cases of compelled speech and compelled silencing?

3. In some human rights cases, a respondent, who is found to have infringed the human rights of a complainant, can be ordered to apologize to the complainant. Does this violate **Charter** s. 2(b)? Is it saved by **Charter** s. 1?

Lavigne v. Ontario Public Service Employee Union et al. [1991] 2 S.C.R. 211

The Supreme Court here unanimously upheld the requirement that a public servant, whose workplace is governed by a certified union, must contribute dues to the union, even where a portion of those dues are used by the union for non-collective bargaining purposes. The appellant, Mr. Lavigne, had objected to union expenditures on certain political causes with which he disagreed. He alleged that this contravened his rights under Charter s. 2(d) and s. 2(d). While most of its discussion focuses on freedom of association, and on whether there was government action in issue in this case within the meaning of Charter s. 32(1), the case is significant vis a vis the meaning of s. 2(b) cas well in the compelled expression context.

Facts

The appellant, a community college teacher, is required to pay dues to respondent union under a mandatory check-off clause ... Such clauses, which incorporate the Rand formula, are permitted by s. 53 of the Colleges Collective Bargaining Act. The appellant objected to certain expenditures made by the union such as contributions to the NDP and disarmament campaigns ...

The judgment of La Forest, Sopinka and Gonthier JJ. was delivered by **LA FOREST J.**:

The broad issue in this appeal is whether the Rand formula, under which dues may be collected from non-union members of a collective bargaining unit for use by the union in its discretion, impermissibly infringes the non-union members' freedom of association and of expression guaranteed by s. 2(d) and s. 2(b) of the Canadian Charter of Rights and Freedoms in a situation where the employer is a Crown agency and the dues are distributed to causes unrelated to the collective bargaining process.

... (The opinion reviewed in detail the facts, including the fact that the community college which employed Lavigne is run by the Ontario government, with its governing board appointed by the provincial cabinet. Union dues checkoff is mandatory although Lavigne did not

speak his mind as and when he wishes. Nor does his being governed by the Rand formula have such an effect. It is a built-in feature of the Rand formula that Union activities represent only the expression of the Union as the representative of the majority of employees. It is not the voice of one and all in the bargaining unit. I find therefore that the appellant's s. 2(b) right has not been infringed. ...

The following is the judgment of **CORY J.**:

On the question as to what constitutes "government" I ... agree with the reasons expressed by Justice La Forest ... In all other respects I am in agreement with the reasons of Justice Wilson.

The following is the judgment of **McLACHLIN J.**:

... I also agree with my colleagues that the payments at issue do not constitute expression under s. 2(b) of the Charter.

Notes and Questions

1. The court's lengthy discussion of the appellant's claim under Charter s. 2(d) freedom o association is omitted here. However, as a matter of general principle, what is the relationship between freedom of association under s. 2(d) and freedom of expression under s. 2(b)?

2. According to the approach to s. 2(b) taken in this case, would s. 2(b) entail a right to refrain from expression, had the facts demonstrated that the appellant's ability to refrain from expression had in fact been curtailed?

3. Does a right to refrain from expression flow from the Irwin Toy approach?

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. ... There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. ... These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. ... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. ... "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." Cantwell v. Connecticut [310 U.S. 296, at 309-10]

On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being "forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." State v. Brown, 68 N.H. 200. It was further said: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. ... The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. ... Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. ... The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker. ..."

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. ...

[T]he challenged statute, on its face and as applied, does not contravene the Fourteenth Amendment.

Notes and Questions

1. Chaplinsky also introduced the "fighting words" doctrine; the proposition that the First Amendment does not protect words which constitute a direct personal insult and thereby create a risk of violent confrontation remains good law.

2. Examine Chaplinsky's list of excluded categories. What is the connection, if any, between the "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"? What does it mean to say that by their very utterance these words "inflict injury"?

3. For purposes of adjudication, what does it mean to say that a category of expression is definitional excluded? In Roth, Justice Harlan recognized how difficult it would be to maintain a distinction between speech that is categorically excluded and speech that is included, but outside the scope of protection in the particular circumstances. There, he stated that abstract classifications cannot determine concrete results because "every communication has an individuality and 'value' of its own." [354 U.S. at 497] Any assumption that obscenity is a "peculiar genus" that is "distinct, recognizable, and classifiable" was unrealistic. [Id.] Because the problems of decision-making do not "lend themselves to generalized definitions", he concluded that particularized judgments would be unavoidable. [Id.] Do those comments have any implications for the **Charter** and in particular, for the relationship between s. 2(b) breach and s. 1 justification?

4. Consider the underlying assumption of Chaplinsky: that some categories of expression are of such marginal social utility that the state's interest in prohibiting them outweighs the Constitution's interest in protecting them, as a matter of definition? Do you have any difficulty with this rationale? What is "social utility" and who decides what its content is? Is this a workable constitutional standard? why not?

5. Which approach do you prefer: Irwin Toy's articulation of abstract criteria to limit the scope of expressive freedom, or Chaplinsky's concrete list of excluded subjects?

6. Is it possible to develop an approach to s. 2(b) which does not require the court to engage in some kind of definitional exercise, or is this inevitable in light of the **Charter**'s enunciation of rights, and its limitation of them under s. 1? Is there something different either in principle or in practice between defining a right of freedom of expression on the one hand, and identifying the scope of permissible limits on this freedom under s. 1?

functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted. The case [is] therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. ...

O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation [unconstitutional].

Notes and Questions

1. Early in the evolution of the First Amendment jurisprudence, the U.S. Supreme Court protected a red flag display in Stromberg v. California, 283 U.S. 359 (1931), and freedom from compulsory flag salute, in West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Despite those precedents, the Court continued to vacillate in cases that raised the speech-conduct distinction. In Cox v. Louisiana, 379 U.S. 559 (1965), for example, Justice Black argued in his dissenting opinion, that the First Amendment does not grant a constitutional right "to engage in the conduct of picketing or patrolling. ... Picketing, though it may be utilized to communicate ideas is not speech and therefore is not of itself protected by the First Amendment." [emphasis added]. Subsequently, however, a majority held that the symbolic act of wearing black armbands in school to protest the Vietnam War was "closely akin to pure speech". Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

In addressing this issue, the Court faced the following dilemma: as Justice Black observed, to treat conduct as speech would obliterate a distinction the First Amendment makes mandatory. Such a conclusion would not only deny the state considerable authority to regulate conduct, but also jeopardize or demean the first amendment's status as a "preferred freedom". On the other hand, the Court was aware that conduct communicates ideas and messages in many cases, and that communicative activity often combines elements of conduct and expression. In such circumstances, a categorical distinction between speech and conduct seems artificial.

2. It is arguable that, in publicly burning his draft card, O'Brien did not engage in any speech activity, at least as "speech" is traditionally defined. Did the Court deny the existence of any expressive element in O'Brien's conduct?

Would the result have been any different if he had stood on the steps of the courthouse, loudly verbalizing the message his eard-burning display depieted? Should it have been? Sce Street v. New York, 394 U.S. 576 (1969) (reversing a eonvietion for flag-burning: because the accused simultaneously denounced the flag verbally while engaging in the aet of burning it, it was impossible to determine whether he had been punished for the aet of flag-burning or for the words he uttered).

Is it appropriate for the Court to distinguish betwcen "pure spcech" [as in Tinker], and "speeeh plus" [as in Cox II, and O'Brien]? Why or why not?

3. In what way did the Court eonsider the speech/conduet distinetion rclcvant? How deferential to government was the standard of review in this ease? Should the Court have been strieter or mor relaxed in its assessment of the state's justifieation for punishing O'Brien? Why or why not? In partieular, do you think O'Brien was eonvieted bceause the message he delivered was politieally unaeeeptable, or beeause burning a draft card is less expressive and therefore entitled to less proteetion under the first amendment?

4. It was eommon ground that the purpose of this regulation was to prevent the destruction of draft eards as a form of opposition to the Vietnam war. Should a eensorial motive on the part of the state have been taken into account in this ease? Why or why not?

5. Do you agree that the prohibition against tampering with his draft eard only imposed an incidental limitation on O'Brien's First Amendment rights? Should the First Amendment protcet his freedom to protest the war in this partieular way? Does the fact that he remained free to protest the war in other ways justify this particular regulation?

Texas v. Johnson, 109 S.Ct. 2533 (1989)

[After publiely burning an American flag as a mcans of politieal protest, Gregory Lee Johnson was convieted of desecrating a flag in violation of Texas law. See infra, Chapter VI, for the Court's diseussion of the facts, and applieable First Amendment doctrine. This cxcerpt deals with the status of flag burning and the speeeh/eonduet distinetion.]

Brennan J.: ...

Johnson was eonvieted of flag desecration for burning the flag rather than for uttering insulting words. ... This faet somewhat complicates our eonsidcration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted

Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America."

We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred. In Spence, for example, we emphasized that Spence's taping of a peace sign to his flag was "roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy." 418 U.S., at 410. The State of Washington had conceded, in fact, that Spence's conduct was a form of communication, and we stated that "the State's concession is inevitable on this record." Id., at 409. ...

Johnson burned an American flag as part - indeed, as the culmination - of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. ... In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication," Spence, 418 U.S., at 409 to implicate the First Amendment.

Notes and Questions

1. There was no expressive activity, concurrent with the prohibited conduct, in either O'Brien or Johnson. In Johnson, however, the U.S. Supreme Court seemed to assume that every act of flag desecration will per se be understood as a form of political protest. In O'Brien, was the Court willing to make the same assumption about other symbolic acts of protest involving physical destruction?

Is there any relevant difference between burning a flag and burning a draft card: both seem more akin to conduct than speech. Yet the Court declined to apply O'Brien in Johnson. Can there be any doubt that O'Brien's card burning was intended to be and was understood as an expression of his opposition to the war? Does that suggest that Johnson implicitly overrules O'Brien? Alternatively, should Johnson be understood as a decision that deals only with the flag as a unique national symbol?

2. What about a statute that prohibits anyone from wearing a "mask, hood, or device" to conceal identity? When members of the Ku Klux Klan wear their white hoods, are they communicating any message? Should their right to wear those masks be protected under the First Amendment as symbolic conduct? Why or why not? [See Georgia v. Miller, No.90D929-2] (invalidating a statute that prohibits members of the Klan from wearing their traditional white

hoods to conceal their identity).

3. How would the Canadian authorities, Dolphin Delivery and Irwin Toy, analyze an act of flag desecration?

4. Consider the following passage from Chief Justice Rehnquist's dissenting opinion in Johnson:

> The result of the Texas statute is obviously to deny one in Johnson's frame of mind one of many means of 'symbolic speech'. Far from a case of "one picture being worth a thousand words", flag burning is the equivalent of an inarticulate grunt or roar that...is most likely to be indulged in not to express any particular idea, but to antagonize others. ... The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest -- a form of protest that was profoundly offensive to others -- and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his disapproval of national policy. ... It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it...for which he was punished. If, as Justice Rehnquist suggests, Johnson was otherwise free to engage in political protest through verbal means, why should he be entitled to claim constitutional protection for his conduct? Is Rehnquist's a valid point? Why or why not?

5. Under U.S. doctrine, would it be constitutional to pass a law, within a legislature's legislative jurisdiction, which provides that "No person shall engage in speech which is not protected by the First Amendment."?

6. Is it necessary for every act of expressive activity to advance "a particularized message", in order to warrant the Constitution's protection? What is so "particularized" about an act of flag desecration? a black armband protest? In any event, what is a particularized message: the particular message the speaker attempts to convey, or whatever particular interpretation the listener gives that message? Is the listener's reaction relevant at all?

7. Clark v. Community for Creative Non-Violence, 468 U.S. (1984) considered whether a National Park Service regulation prohibiting camping in certain parks violated the First Amendment. Demonstrators proposed to "sleep" in Lafayette Park and the Mall in Washington D.C. in order to protest and call attention to the plight of the homeless. Two aspects of the U.S. Supreme court's decision are significant. First, the court agreed that overnight sleeping in a national park is expressive conduct for purposes of the First Amendment. Second, however, a majority concluded that the camping prohibition served a valuable purpose of protecting parks. By contrast, the dissenting opinion argued that the sleep-in was the speakers' most effective way

of communicating their message and therefore, that the state could not justify its prohibition against camping in the circumstances of this case. Does Charter s. 2(b) guarantee the use of the most effective mode of getting one's message across, or just the right to get it across somehow or other?

(C) THE SEVERITY OF THE BURDEN ON EXPRESSION

Rust, et al., v. Sullivan, Secretary of Health and Human Services; New York, et al., Supreme Court of the United States 111 S. Ct. 1759; 1991

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, KENNEDY, SCALIA, and SOUTER, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined; in Part I of which O'CONNOR, J., joined; and in Parts II and III of which STEVENS, J., joined. STEVENS, J., and O'CONNOR, J., filed dissenting opinions.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

These cases concern a facial challenge to Department of Health and Human Services (HHS) regulations which limit the ability of Title X fund recipients to engage in abortion-related activities. The United States Court of Appeals for the Second Circuit upheld the regulations, finding them to be a permissible construction of the statute as well as consistent with the First and Fifth Amendments of the Constitution. ....We affirm.

I

A

In 1970, Congress enacted Title X of the Public Health Service Act (Act), ...which provides federal funding for family-planning services. The Act authorizes the Secretary to "make grants [*10] to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." Grants and contracts under Title X must "be made in accordance with such regulations as the Secretary may promulgate." Section 1008 of the Act, however, provides that "none of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." That restriction was intended to ensure that Title X funds would "be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities." In 1988, the Secretary promulgated new regulations

governmental intrusion. ... The majority's approval of the Secretary's Regulations flies in the face of our repeated warnings that regulations tending to "confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession," cannot endure...

JUSTICE STEVENS, dissenting.

... Because I am convinced that the 1970 Act did not authorize the Secretary to censor the speech of grant recipients or their employees, I would hold the challenged regulations invalid...

Even if I thought the statute were ambiguous, however, I would reach the same result for the reasons stated in JUSTICE O'CONNOR's dissenting opinion. As she also explains, if a majority of the Court had reached this result, it would be improper to comment on the constitutional issues that the parties have debated. Because the majority has reached out to decide the constitutional questions, however, I am persuaded that JUSTICE BLACKMUN is correct in concluding that the majority's arguments merit a response. I am also persuaded that JUSTICE BLACKMUN has correctly analyzed these issues. ...

JUSTICE O'CONNOR, dissenting, would have struck the regulations down on administrative law grounds, and hence, found it unnecessary and inappropriate to pronounce on the constitutional attack.

Notes and Questions

1. How would this case be decided under Irwin Toy? Do the regulations restrict "expression"? If so, is their purpose to restrict freedom of expression? Is that their effect?

2. Is the court correct in concluding that there is no First Amendment violation here? Compare this case to Lavigne supra. Is this a compelled speech case? Is the alleged burden on expression greater here than in Lavigne, or is it less?

3. Do you find persuasive the majority's view that as for clinic employees, it is a matter of their own personal choice that they opt to work at a regulated clinic, and so they have no basis for blaming the government about restrictions on their speech at work? Compare the discussion later in these materials about the constitutionality of laws restricting political activity by public servants in Chapter 24.

Elections Act to permit the appellant Haig to vote as Decary J.A. outlined. Hopefully, the Canada Elections Act or the Referendum Act provisions will be clarified if Parliament decides to hold a referendum in the future. ...

The following is the judgment delivered by

[para157] LAMER C.J. (dissenting):-- I agree with Cory J. with respect to the proper approach to the definition of residency for voting purposes. I also agree with Iacobucci J. concerning s. 2(b) of the Canadian Charter of Rights and Freedoms and with respect to his proposed disposition of this appeal. I would, therefore, dispose of the appeal as proposed by Iacobucci J.

Notes and Questions

1. Do you agree that casting a secret ballot in a referrendum is "expression"? What are the arguments for and against this proposition, beyond the discussion of this in these opinions?

2. What are the implications of a holding that the exercise of the vote is an exercise of expression? Is the chance to answer a public opinion poll, contracted for by the federal government to test the political waters, equally "expression"?

3. What if anything was Haig trying to say? Was he able to say it? Has this case expanded the concept of "expression" beyond its characterization in Irwin Toy?

4. Do you think that Haig's inability to vote in a referendum that day violated his s. 2(b) rights? If so, should s. 1 save this? If not, what more would you need to establish a s. 1 defence here?

5. Elsewhere, the Supreme Court has dealt with the proper approach to the overlap between freedom of religion in s. 2(a) and freedom of expression in s. 2(b) to harmonize the two rights. (See e.g. Ross v. N.B. School District and Young v Young) Is that effort consistent witht the Court's approach to s. 2(b) here as it interrelates with the right to the federal and provincial vote in s. 3 of the Charter?

In my view, though a referendum is undoubtedly a platform for expression, s. 2(b) of the Charter does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to anyone, let alone to everyone. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law.

A municipal plebiscite, like a referendum, is a creation of legislation. In the present case, any right to vote in a plebiscite must be found within the language of the VLT Act. It alone defines the terms and qualifications for voting. Accordingly, the appellants cannot complain that the VLT Act, itself, denied them the right to vote in a VLT plebiscite.

[para43] A caveat was added in Haig that, once the government decides to extend referendum voting rights, it must do so in a fashion that is consistent with other sections of the Charter. However, as the appellants submitted that they had been denied referendum voting rights on a discriminatory basis, their claim should be assessed under s. 15(1), of which more will be said below.

[para44] Finally, it is worth noting that the VLT Act does not prevent the residents of Winkler from voting in future plebiscites on the issue of VLTs. They have not been disenfranchised from VLT plebiscites. Like all other residents of Manitoba, they are free to initiate a plebiscite under the Act to either reinstate or remove VLTs from their municipality....

NOTES AND QUESTIONS

1. Should casting a vote be treated as an exercise of s. 2(b) expression?

Native Women's Assn. of Canada v. Canada [1994] 3 S.C.R. 627

During the constitutional reform discussions which eventually led to the Charlottetown Accord, a parallel process of consultation took place within the Aboriginal community of Canada. The federal government provided $10 million to fund participation of four national Aboriginal organizations: the Assembly of First Nations ("AFN"), the Native Council of Canada ("NCC"), the Metis National Council ("MNC") and the Inuit Tapirisat of Canada ("ITC"). The Native Women's Association of Canada ("NWAC") was specifically not included in the funding but a portion of the funds advanced was earmarked for women's issues. As a result, AFN and NCC each paid $130,000 to NWAC and a further $300,000 was later received directly from the federal

Notes and Questions

1. Does this case involve a governmental restriction on "expression", either as you would have it defined, or as Irwein Toy defines it?

2. If this case involves "expression" being regulated, what else does? What does not?

3. How does the analysis of this case square with the "public forum" approaches of the various justices in the Committee for the Commonwealth of Canada case? What are the common issues or elements?

4. How does this case fit in with the issue of a claim by a member of the public to a s. 2(b) right of access to airtime on the broadcast media?

5. Had the appellant won under s. 2(b), is the Oakes s. 1 test suitable for dealing with limits on this right?

6. To what extent should cost be a defence under Charter s. 1 to free expression claims? The Supreme Court rejected cost to government as a justification for denying an accused person their s. 11(b) right to a trial in a reasonable time, in R. v. Askov? (1990) 59 C.C.C. (3d) 449, holding "The right guaranteed by s. 11(b) is of such fundamental importance to the individual and of such significance to the community as a whole that the lack of institutional resources cannot be employed to justify a continuing unreasonable postponement of trials."

6. WHAT=S IN A NAME?

Walker v. Prince Edward Island [1995] 2 S.C.R. 407

Facts taken from the P.E.I. Supreme Court, Appeal Division decision

This case concerns the right to practice public accountancy in the Province of Prince Edward Island. The appeal is from the October 29, 1992 Trial Division decision of Campbell J. declaring s-s. 14(1) of the Public Accounting and Auditing Act unconstitutional.

The respondents who are certified general accountants, but not chartered accountants, sought this declaration because they want to obtain full rights to practice public accountancy in Prince Edward Island which, by virtue of s-s. 14(1) of the Public Accounting and Auditing Act, have been reserved to members of the Institute of Chartered Accountants.

Subsection 14(1) provides as follows:

No person shall practice as or usurp the functions of a public accountant or in any way represent himself or any firm of which he is a partner to be, or to act in such manner as to lead to the belief that he or it is, a public accountant or firm of public accountants, unless he is

(a) a member of the Institute; or

(b) the holder of a license to practice issued by the Institute which is in full force and effect.

The term "institute" is defined in s-s. 1(b) of the Public Accounting and Auditing Act as The Institute of Chartered Accountants of Prince Edward Island. "Public accountant" is defined in s-s. 1(d) as a person who alone or in association with others, carries on the practice of public accounting and auditing and in connection with that practice, offers his services for reward to the public. According to s-s. 1(e),

"public accounting and auditing" means the investigation or audit of accounting records or the preparation of, or reporting on, balance sheets, profit and loss accounts and other financial statements, but does not include bookkeeping, cost accounting, or the exercise by accountants and auditors in the employ of the governments of the province or Canada of their functions as such.

The judgment of the Court was delivered orally by

[para1] LAMER C.J.:-- In light of our previous decisions as regards ss. 2(b), 6 and 7 of the Canadian Charter of Rights and Freedoms, we are all of the view that there has been no restriction to those rights in this case.

Notes and Questions

1. Is the practice of accounting "expression" within the meaning of s. 2(b)? What about the practice of law?

2. Is this any less expression than the vote in the referendum considered in the Haig case?

1. INTRODUCTION

This chapter commences the inquiry into the status of expressive activity that may offend. As experience has shown, legislative majorities have at times been unable to resist the temptation to prohibit activity that is perceived to be politically, socially or morally offensive. Much of the First Amendment jurisprudence finds its roots in the sedition and espionage cases of the First World War era, and the debate about the permissibility of suppressing communist activities during the Cold War.

Offensive unpatriotic speech may offend its citizens, but is aimed primarily at the state. The suppression of opinions that criticize the government seems particularly inappropriate in a democracy. To Canadians, therefore, the American cases discussing the censorship of unpatriotic expression - as in the Vietnam protest and flag desecration cases - may seem distinctively American.

A subsequent chapter considers the validity of legal restrictions on defamation law. In considering subversive and unpatriotic expression here, it may seem equally clear to some that defamatory statements should not receive any constitutional protection, because in the case of defamation, the offensive expressive activity in question is directed at an individual or individuals, or at members of an identifiable group.

As a matter of principle, however, it may be less clear why individuals should be free to express unorthodox, disloyal or offensive opinions about the state, but not about each other. Whenever the state acts to protect the listener, through Criminal Code provisions or the common law of defamation, it necessarily suppresses the views of the speaker. Whether the censorship of offensive expression is consistent with a guarantee of expressive freedom is the subject of these materials.

These materials lead naturally into subsequent chapters which consider the status of racist speech, and obscenity, pornography and sexist speech, respectively. In discussing whether the state can prohibit opinions, beliefs or ideas it disapproves of, our focus will be on the viability of "content neutrality" as a general principle of adjudication.

2. NOTE: FREEDOM OF EXPRESSION AND THE OFFICIAL REGULATION OF THE CONTENT OF EXPRESSION

The Canadian jurisprudence relating to subversive and unpatriotic expression derives primarily from a series of cases that considered laws passed by the Duplessis government in Quebec during the 1940s and 1950s. These cases are discussed earlier in these materials, in the chapter on pre-Charter Canadian treatment of freedom of expression. Although the cases turned largely on division of powers issues, Justice Rand developed his theory of an "implied bill of rights" in cases like Switzman v. Elbling. There have been no significant Charter cases dealing with subversive or unpatriotic speech.

By contrast, the constitutional status of seditious libel was the dominant issue of First Amendment adjudication from the World War I espionage and sedition prosecutions, and through the Cold War era, until the decision in New York Times v. Sullivan. Though it may be difficult for you to imagine Canadians ever being prosecuted for expressing "unCanadian" views, the civil rights movement, Vietnam protest, and flag desecration cases provide an ideal context in which to begin a discussion of the status of offensive expression.

This rather lengthy introductory note has two purposes. The first is to describe the tension between Chaplinsky's assumption that some categories of offensive expression are excluded from the first amendment, and the competing principle of content-neutrality. The second is to describe the most important precedents that led the U.S. Supreme Court to conclude that the First Amendment requires absolute neutrality.

In Chaplinsky v. New Hamphsire, 315 U.S. 568, 62 S.Ct. 766, Justice Murphy introduced the concept of definitional balancing, or "two-tier theory", as it is sometimes called. As you know, he concluded that "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words'" were categorically excluded from the first amendment, as a matter of definition. Those categories were singled out because, in each case, the expressive activity was perceived to be of such marginal utility that the state's interests in prohibiting it outweighed the first amendment's interest in protecting it. Justice Murphy's claim that some speech activity is "no essential part of any exposition of ideas" was based on an assumption that the First Amendment does not preclude the state from discriminating between expressive activities on the basis of their content.

This assumption was first challenged in Terminiello v. Chicago, 337 U.S. 1 (1949). There the speaker provoked a near riot, and the circumstances seemed tailor-made for application of the fighting words doctrine: a crowd of about 1500 constituted a "surging, howling mob hurling epithets"; 28 windows were broken; and although only 17 were arrested, the police were unable to control the mob. Id. at 16.

A majority of the Court reversed the speaker's conviction under a breach of the peace ordinance. In doing so, Justice Douglas indirectly questioned whether Chaplinsky's concept of social utility was consistent with the first amendment:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute,...is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest. ... There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Having discovered positive value in speech having "profound unsettling effects," Justice Douglas created a tension between Terminiello's hostility to any "standardization of ideas" and Chaplinsky's assumption that "speech" under the First Amendment must advance social truth through the exposition of ideas.

Despite Terminiello, Chaplinsky's two-tier theory was followed in two important decisions, Beauharnais v. Illinois, 343 U.S. 250 (1952) (excluding group defamation), and Roth v. United States, 354 U.S. 476 (1957) (excluding obscenity). Moreover, the U.S. Supreme Court had earlier excluded pure commercial expression from the Constitution in Valentine v. Chrestensen, 316 U.S. 52 (1942).

Over time, however, the two-tier theory gradually eroded. With one exception, it has now been superseded by the principle of content neutrality. (see New York v. Ferber, 458 U.S. 747 (1982)(excluding non-obscene sexual material which exploits children from the first amendment). New York Times v. Sullivan, 376 U.S. 254 (1964), extending the first amendment's protection to defamatory statements, was a critical turning point. The general principle of content neutrality did not crystallize, however, until Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

This introduction gives a very brief summary only of the key precedents that challenged the proposition that the state can entrench its own definition of social truth or utility by prohibiting opinions or beliefs that challenge orthodox views.

One of the most compelling statements of the first amendment's roots in a dissident tradition will be found in the Flag Salute Case [West Virginia Bd. of Education v. Barnette, 319 U.S. 624 (1923)]. There, a majority of the Court held that the First Amendment protected the children of Jehovah's Witnesses from participating in mandatory flag salute at a public school. What follows is one of the most famous passages in First Amendment literature:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

As you may be aware, the U.S. Supreme Court thereafter found the threat of communism sufficient to legitimize the suppression of political speech in almost every case during the 1950s. The results in these cases were governed by the doctrine that applied in cases of subversive advocacy, and not by Barnette, or by Terminiello's anti-censorship principle. As the tension of the McCarthy era subsided, the censorial implications of this jurisprudence became glaring. Although the U.S. Supreme Court's complicity in the suppression of political speech diminished in the late 1950s, the breakthroughs of the next era were motivated less by regret over the treatment of Communist sympathizers than by the events of the civil rights movement.

Though violence was not a part of the Cold War legacy, it was the harsh reality of the civil rights movement. Many Southerners considered its ideas indistinguishable from Communism, and almost as dangerous. Recognizing that a weak interpretation of the First Amendment might jeopardize the movement's reforms and even undermine the desegregation principle, the U.S. Supreme Court began edging toward a general principle of content neutrality. The principles established in these cases were re-enforced and extended in the cases dealing with anti-Vietnam protest.

In N.A.A.C.P. v. Button, 371 U.S. 415 (1963), the majority opinion invalidated regulations which had the effect of restricting the N.A.A.C.P.'s program of sponsoring civil rights litigation. Citing Terminiello, Justice Brennan stated that the Constitution protects expression and association "without regard to the race, creed or political or religious affiliations of [those invoking] its shield", or to the "truth, popularity or social utility of the ideas and beliefs which are offered."

New York Times v. Sullivan concerned a civil action in libel arising from the publication of an advertisement claiming that Southern officials had mistreated civil rights activists. In concluding that the First Amendment protects defamatory statements made about public officials, Brennan stated that any other rule, which would place members of the press at risk of liability, would have a chilling effect on public debate. Such a result would violate the basic principle that "the censorial power is in the people over the Government, and not in the Government over the people."

Despite its importance as a turning point in the evolution of modern First Amendment doctrine, Sullivan did not explicitly endorse the principle of content neutrality. Two Vietnam protest cases advanced the proposition that a basic requirement of content neutrality prohibits the state from punishing offensive messages, before Cohen v. California was decided.

In Tinker v. Des Moines School District, 393 U.S. 503 (1968), the Court held that the First Amendment protected the right of public school students to wear black armbands in protest against the Vietnam War. Citing Terminiello, Justice Fortas stated that provocative speech is one of the

by-products of a commitment to an open, participatory democracy: freedom may be hazardous, but the openness it prizes is "the basis of [America's] strength and of the independence and vigour of Americans who grow up and live in this relatively permissive, often disputatious society." Id. at 509.

Then in Street v. New York, 394 U.S. 576 (1969), the Court concluded that a conviction for flag burning could not be sustained. While noting that disrespect for the flag should be deplored, no less in vexed times than in calmer periods, the Court concluded that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." Id.at 592. Inherent in the assertion that the Constitution tolerates and protects all forms of expression, "however distasteful", was a requirement of content neutrality.

Cohen v. California was the Court's next decision. Justice Harlan's opinion rendered recognition of the principle of content neutrality the following year in Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972), almost unavoidable. We will spend some time exploring the implications of that principle before discussing Texas v. Johnson and the status of flag desecration.

3. CANADIAN LAW ON SUBVERSIVE AND UNPATRIOTIC SPEECH

Criminal Code, R.S.C. 1985, c. C-46

59. (1) Seditious words are words that express a seditious intention.

(2) A seditious libel is a libel that expresses a seditious intention.

(3) A seditious conspiracy is an agreement between two or more persons to carry out a seditious intention.

(4) Without limiting the generality of the meaning of the expression "seditious intention", every one shall be presumed to have a seditious intention who

(a) teaches or advocates, or
(b) publishes or circulates any writing that advocates, the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada.

60. Notwithstanding subsection 59(4), no person shall be deemed to have a seditious intention by reason only that he intends, in good faith,

(a) to show that Her Majesty has been misled or mistaken in her measures;
(b) to point out errors or defects in

(i) the government or constitution of Canada or a province,
(ii) Parliament or the legislature of a province, or
(iii) the administration of justice in Canada;

(c) to procure, by lawful means, the alteration of any matter of government in Canada; or
(d) to point out, for the purpose of removal, matters that produce or tend to produce feelings of hostility and ill-will between different classes of persons in Canada.

61. Every one who

(a) speaks seditious words,
(b) publishes a seditious libel, or
(c) is a party to a seditious conspiracy,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Notes and Questions

1. a) The view that an implied bill of rights existed within the preamble to the **Constitution Act, 1867**, was first suggested by Duff C.J. in The Alberta Press Case, supra, in the chapter on pre-Charter Canadian law on freedom of expression. This suggestion was adopted and developed by Rand, Kellock and Locke JJ., in Saumur v. City of Quebec, [1953] S.C.R. 299, and by Rand, Kellock and Abbott JJ., in Switzman v. Elbling [1957] S.C.R. 285. Justice Abbott reasons in Switzman indicated that he was prepared to extend the concept even further:

... although it is not necessary, of course, to determine this question [in this appeal], the Canadian Constitution being declared to be similar in principle to that of the United Kingdom, I am also of the opinion that as our constitutional act now stands, Parliament itself could not abrogate this right of discussion and debate. (See also the excerpt from Switzman in the chapter on pre-Charter Canadian treatment of freedom of expression.)

2. In Boucher v. The King, [1951] S.C.R. 265 a Jehovah's Witness was convicted of publishing a seditious libel. He had distributed a pamphlet titled "Quebec's burning hate for God and Christ and Freedom is the shame of all Canada". The pamphlet was critical of the Quebec legislature and the Quebec courts. A majority of the Court agreed that a new trial should be ordered. Justice Rand's comments about expressive freedom are of interest:

... The crime of seditious libel is well known to the common law. ... If we conceive of the governors of society as superior beings, exercising a divine mandate, by whom laws, institutions and administrations are given to men to be obeyed, who are, in short, beyond criticism,

> reflection or censure upon them or what they do implies either an equality with them or an accountability by them, both equally offensive. ...

But constitutional conceptions of a different order making rapid progress in the 19th century have necessitated a modification of the legal view of public criticism; and the administrators of what we call democratic government have come to be looked upon as servants, bound to carry out their duties accountably to the public. ...

There is no modern authority which holds that the mere effect of tending to create discontent or disaffection ... or ill-will or hostility..., but not tending to issue in illegal conduct,constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the staff of daily experience to suggest that mere ill will as the product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency. What is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, disaffection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and...in the search for the constitution and truth of things generally. ...

3. How would Switzman and Boucher be decided under the **Charter**? According to Irwin Toy, would seditious libel be considered a violent form of expression, and therefore excluded from s.2(b); alternatively, should it be characterized as "advocacy" rather than as "incitement"?

4. Could the **Criminal Code**'s seditious libel provision sustain a **Charter** challenge? does it conflict with **Charter** s. 2(b)? Is resort to s. 1 required? If resort to s. 1 is required, would this provision be defensible under the reasonable limits clause?

Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seem misplaced and unnecessary. ...

Notes and Questions

1. For the evolution of the First Amendment's general approach to subversive and unpatriotic expression, see the excerpts from Schenck v. U.S., 249 U.S. 47 (1919), Abrams v. U.S., 250 U.S. 616 (1919), Whitney v. California, 274 U.S. 357 (1927), and U.S. v. Dennis, 341 U.S. 494 (1951) in the earlier chapter on general First Amendment principles.

2. Here the state insisted that it was not the content of Cohen's message that was offensive, but its form. In other words the state was not seeking to censor Cohen's anti-war message, it was only seeking to protect the public from an offensive presentation of that message. Is this a principled distinction? On the other hand, however, if you agree with the Court in this case, does that mean the First Amendment prohibits the state from imposing any limitations on an individual's freedom to express himself offensively? If Cohen had shouted "fuck the draft" out, would the result have been the same? Urinated to express his disapproval? Shouted while urinating? Why or why not?

3. Subject to the speech-conduct distinction, and the question whether the state was merely restricting the presentation of the message and not its content, Cohen's jacket was constitutionally protected as political speech. Note that before reaching this conclusion, the Court considers a number of possibilities: that the jacket would cause violent outbreaks, either hostile or sympathetic, or was otherwise "obscene."

Acknowledging that there is a legitimate state interest in preventing speech that would result in breaches of the peace, is it legitimate for the state to enforce morality through its authority to prohibit opinions that are considered offensive? Should any legislative body, no matter what its composition, have the power to quell unpopular speech? If your answer is no, does that mean that the legislature has no power to prohibit any opinions on the basis of their content? When might such a power be consistent with the first amendment? Unless prospective violence is the sole criterion of unconstitutionality, is there any way to exclude offensive speech from the first amendment?

4. For Canada's own "Cohen v. California" equivalent, see R. v. Stewart (1980), 54 C.C.C. (2d) 503 (Ont. Prov. Ct.), in which a person, entering Canada at the U.S. border, was charged with exhibiting an obscene or disgusting object, because he wore a button reciting the words "Fuck Iran". In finding that this did not constitute a contravention of the criminal law, the court held in material part as follows:

> In early times, which times are still within the recollection of this Court, the word which the Crown relies on as making the button in question disgusting, meant to have sexual intercourse. It is put, however, that such meaning is no longer the sole interpretation to be given the word and that in common parlance such meaning is not the meaning intended to

> be conveyed at all. Surely, with respect to the button in question, the author did not intend to convey the notion that everyone should engage in sexual intercourse with Iran. Such an interpretation would be ridiculous in the last degree. One must, I believe, conclude that the word used on the button, given the present political relationship and climate which exists relative to Iran, is meant as a denunciation of that country. In other words, it is a more than forceful way of saying, "down with Iran", or, if I may, "to hell with Iran".
>
> It is put that the use of the word in question is quite prevalent in our society today, among certain people that is, and that, as already stated, the meaning to be attached to the word generally has changed. The gap between its original meaning and its present day meaning is the size of a gigantic chasm. [at 505].

Texas v. Johnson, 109 S.Ct. 2533 (1989)

During the 1984 Republican National Convention, respondent Johnson participated in a political demonstration to protest the policies of the Reagan administration and some Dallas-based corporations. After a march through the city streets, Johnson burned an American flag while protesters chanted. No one was physically injured or threatened with injury, although several witnesses were seriously offended by the flag burning. Johnson was convicted of desecration of a venerated object in violation of a Texas statute, and a state court of appeals affirmed. However, the Texas Court of Criminal Appeals reversed, holding that the State, consistent with the First Amendment, could not punish Johnson for burning the flag in these circumstances. The court first found that Johnson's burning of the flag was expressive conduct protected by the First Amendment. The court concluded that the State could not criminally sanction flag desecration in order to preserve the flag as a symbol of national unity. It also held that the statute did not meet the State's goal of preventing breaches of the peace, since it was not drawn narrowly enough to encompass only those flag burnings that would likely result in a serious disturbance, and since the flag burning in this case did not threaten such a reaction. Further, it stressed that another Texas statute prohibited breaches of the peace and could be used to prevent disturbances without punishing this flag desecration.

Held: Johnson's conviction for flag desecration is inconsistent with the First Amendment. Pp. 402-420.

(a) Under the circumstances, Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment. The State conceded that the conduct was expressive. Occurring as it did at the end of a demonstration coinciding with the Republican National Convention, the expressive, overtly political nature of the conduct was both intentional and overwhelmingly apparent. Pp. 402-406.

(b) Texas has not asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression and would therefore permit application of the test set forth in United

I respectfully dissent.

Notes and Questions

1. The majority opinion might be seen as a good example of First Amendment romanticism; its rhetoric appeals to "the dissident tradition" that was protected in important decisions like Barnette (The Flag Salute Case). Do you find the majority opinion persuasive? This was not a case in which Johnson destroyed a piece of his own property: the flag he burned was stolen. How was his act different from any other act of destruction or property damage? Why should the First Amendment protect this act of destruction but not other types of property damage, such as writing graffiti on building walls and subway cars? [Presumably he could be convicted for defacing the property of others with graffiti.]

Recall that Justice McIntyre explicitly stated in Dolphin Delivery that "threats or acts of violence, property destruction, assault, or other clearly unlawful conduct" are excluded from s.2(b) of the **Charter**. Does that mean that an act of flag-burning or flag-trampling would not be within the scope of freedom of expression in Canada? Would either of these acts be excluded from s.2(b) under Irwin Toy, as a violent form of expression? Is a regulation prohibiting flag desecration merely aimed at the physical consequences? i.e., the destruction of property? Would Johnson's act of protest be excluded from s.2(b) under that branch of Irwin Toy's doctrine?

2. Moreover, as both Rehnquist C.J. and Stevens J. observe, Johnson otherwise remained free to engage in political protest through any number of alternative ways. In other words, he was only being punished for the form his expression took, and not its underlying message of protest.

Flag-burning is the ultimate act of heresy in American political culture. If the state cannot limit the manner in which the message was communicated in a case like this, can it ever deny the speaker the right to destroy property in the name of "protest"?

In the Weisfeld case, (1989), 42 C.R.R. 238, dealing with the Parliament peace camp, the Federal Court, Trial Division heard a s. 2(b) argument that the establishment of a peace camp on Parliament Hill to symbolize the plaintiff's continuous and ongoing protest against the cruise missile policy was essential to the effective communication of his political message and that the actions of the defendants in dismantling and removing the peace camp shelter from Parliament Hill violated ss.2(b), 2(c) and 2(d) of the **Charter**. The plaintiff claimed that he was expressing a political message of protest to the cruise missile policy of the Canadian government by both direct and symbolic means, and that the symbols represented by the shelters, tents and tables on Parliament Hill were in fact political forums for discussion and debate that were essential to the effective communication of the political message. The court held that the plaintiff and his associates were never prevented from communicating their political message of protest to the government's cruise missile policy on the grounds of Parliament Hill by word of mouth solicitation or by carrying placards or banners or by handing out literature, nor were they ever prevented from

assembling or associating on the Parliament Hill grounds for the purpose of making their protest views known by these means. What they were prevented from doing was erecting or placing shelters, tents, tables and other objects on the grounds of Parliament Hill. It concluded that:

> the freedom of expression guaranteed by s.2(b) of the Charter is not an absolute and unqualified freedom to disregard existing laws reflecting the collective interests of organized society as a whole. ...the governmental constraints were directed only to the reasonable regulation of conduct in terms of time, place and manner restrictions. ...these constraints did not impact adversely upon the content of the plaintiff's message as manifested by the normal vocal, visual or demonstrative means of communication in respect thereof.

Was there any evidence that the peace camp caused any physical damage to the grounds at Parliament Hill? The peace camp activists presumably believed that they had selected the perfect time and place and manner for making their position known to members of Parliament and the public. It is likely that judges who were unwilling to recognize the special symbolic status of the flag in Johnson would possibly be unlikely to recognize Parliament's authority to preserve the aesthetic appearance of the National Capital Region. Does Johnson suggest that Weisfeld was wrongly decided?

3. Under the first amendment, the state is allowed to regulate radio and television broadcasts which are considered offensive, at least in part, on the theory that the "airwaves" are a public trust which must be administered by the government on behalf of society at large. Is an analogy to the flag, as a national symbol that belongs to "we, the people" as a collective entity, far-fetched? Could the state protect the flag from defacement by declaring exclusive property rights in it and licensing its use?

4. This Term, the U.S. Supreme Court invalidated the federal **Flag Protection Act** of 1989. See United States v. Eichman, 110 S.Ct. 2404 (1990).

This chapter inquires into the extent to which freedom of expression can justifiably be limited in order to protect national security. In examining the following materials, consider the two conflicting claims which inevitably arise in national security/free speech cases. On the one hand, it is argued that the protection of national security is so fundamental to society, and the enemies to a nation's security (such as terrorists) employ such insidious methods to secure their aims, that government must be given wide latitude to promote national security; the courts should afford the government great deference in these circumstances. On the other hand, it is argued in opposition to the foregoing view that in times of severe threat to national security, freedom of expression and other basic rights are in such profound jeopardy that their protection requires increased vigilance.

Core issues that arise in this context include those of what exactly is meant by national security? Can it be defined? And who should have the final say on national security issues, the courts or the government?

2. BACKGROUND TO THE CANADIAN APPROACH

Freedom and Security under the Law, the Second Report of the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (August, 1981); Summary of Recommendations

4. WE RECOMMEND THAT the legislation establishing Canada's security intelligence agency contain a clause indicating that the agency's work should be limited to what is strictly necessary for the purpose of protecting the security of Canada and that the security intelligence agency should not investigate any person or group solely on the basis of that person's or group's participation in lawful advocacy, protest or dissent. ...

41. WE RECOMMEND THAT it not be the function of the security intelligence agency to carry out defusing programmes and that the agency not be permitted to use conspicuous surveillance groups for the purpose of intimidating political groups. ...

197. WE RECOMMEND THAT certain fundamental rights and freedoms, such as those specified in the Public Order (Temporary Provisions) Act, those specified in Article 4 of the International Covenant on Civil and Political Rights [including freedom of expression], and the rights of citizens not to be deprived of citizenship or exiled, not be abrogated or abridged by the War Measures Act or any other emergency legislation under any circumstances. ...

1. INTRODUCTION

Anglo-Canadian and U.S. statute and common law have traditionally placed great value on a person's good name and reputation. The tort of defamation originated as a common law cause of action, but now is governed by a mixture of common law and statutory provisions. It essentially gives a person a cause of action for damages if a statement is communicated to another about the plaintiff which is false, and which is injurious to his or her reputation. The civil law allows for some defenses. For example, certain statements, uttered in certain circumstances, are protected by either an absolute or qualified privilege. For example, truthful statements cannot give rise to a tort claim. Statements made in open court are absolutely privileged, no matter how defamatory. In addition to the civil action for defamation, the Criminal Code creates a seldom-invoked crime of criminal defamation.

Defamation law presents the vexing question of the state's role in drawing official lines between "truth" and "falsehoods". Defamation proceedings involve contests over whether a publication, broadcast or statement is truthful. This in turn raises the question of who is the appropriate arbitor of "truth" in a free and democratic society whose constitution enshrines freedom of expression as a supreme right? Is this the function of courts, of legislators, or ultimately, of the public alone?

Canadian criminal and civil defamation law evolved over many years, at a time when Canada's constitution included no supreme guarantee of freedom of expression or press. To what extent do the pre-existing civil law of defamation, and the Criminal Code defamation provisions withstand **Charter** scrutiny? While ruling on **Charter** claims in the earliest years of the **Charter,** some Canadian courts have suggested in passing (and at times, in wholly unrelated situations) that defamation law does not infringe upon the freedom of expression (see e.g. the Ontario Court of Appeal in Federal Republic of Germany v. Rauca (1983) 145 D.L.R. (3d) 638, at 655). However, did such courts jump to quickly to a conclusion which is either entirely or at least partially incorrect? The Supreme Court of Canada has not yet squarely considered whether defamation laws as such violate s. 2(b). However, the court unanimously held in its 1992 Zundel decision infra that s. 2(b) protects deliberate falsehoods, when it considered a challenge to a Criminal Code provision which prohibited the deliberate publication of false news injurious to the public interest.

Consider first how U.S. courts have dealt with First Amendment challenges in this area, and then look to the Canadian approach.

We conclude that such a privilege is required by the First and Fourteenth Amendments.

III

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, ... the rule requiring proof of actual malice is applicable. ...

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. ...

For good reason, "no court of last resort in this country has ever held, or even suggested, that prosecutions for lilbel on government have any place in the American system of jurisprudence." City of Chicago v. Tribune Co., 139 N.E. 86, 88 (1923)... . The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. ... Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied upon by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. ...

Notes and Questions

1. Justice Brennan's opinion relies quite heavily on Madison's views about the role which expressive freedom plays in a republican system of government. Do you agree that America's form of government was "altogether different" from the British form? Does Sullivan's theory of the first amendment apply with equal vigour in a parliamentary democracy? Why or why not?

2. Should all "false" speech be protected on the theory of Sullivan? Should false statements of fact be treated the same way as false statements of opinion? Holmes's example of a man falsely shouting "fire" in a crowded theater may seem obvious. Can you suggest other situations in which it would be appropriate to prohibit expressive activity simply because it is false? Is it feasible to draw bright jurisprudential lines between "fact" and "opinion" for these purposes?

3. As a practical matter, how can a plaintiff meet the Sullivan burden of proof in a libel action, beefed up by the First Amendment. What facts must be established to show that a media defendant knew that its publication was wrong, or was reckless as to its probable falsity? Where can a plaintiff discover evidence of these facts? How affordable will defamation actions be for

plaintiffs?

4. What incentives are created by the Sullivan standard for journalists and media establishements? Is this standard a license to defame?

5. Would it be appropriate as an alternative standard to allow for a civil action to succeed if there is proof that the defendant was negligent, instead of reckless, in making the statement? Can courts enforce a legal standard akin to the "reasonable reporter"?

6. Sullivan involved a libel action against a newspaper, because of the contents of an advertisement which had been placed in that paper. Should the same free speech test be applied where the paper makes defamatory statements in its own news pages as when these statements are found in an advertisement, placed by sponsers extrinsic to the newspaper?

such as the ad parody involved here. The judgment of the Court of Appeals is accordingly reversed.

Notes and Questions

1. Is Rehnquist's opinion in this case consistent with his views about flag desecration? If it is permissible for the state to protect the symbolic status of the flag, why is it not permissible for the law of torts to protect the reputational and privacy interests of individuals? Is an act of flag desecration qualitatatively more offensive, or more harmful to its unwilling audience, than commentary that pillories, maligns or belittles an individual would be to the target of an attack?

2. Is it appropriate to apply the Sullivan test to both tort actions for defamation and actions for intentional infliction of mental suffering? Are there arguments supporting a different standard to be applied to these different torts?

3. In Hustler, the court refers to its holding in Garrison v. Louisiana, supra, a case involving a criminal libel prosecution against a local district attorney for critical statements made against the local judiciary. In that state, both the district attorney and the judges were elected to office. Should the same First Amendment standard apply to both civil and criminal proceedings for defamation? Is there a constitutionally-relevant difference when a defendant faces proceedings instituted by the state, and when the proceedings are brought by a private party?

4. THE CANADIAN APPROACH

Notes and Questions

1. Does the tort of defamation, as traditionally constituted, comply with the **Charter**? Does it infringe s. 2(b)? Is defamatory or untrue speech simply unprotected by s. 2(b)? If not, to what extent is the tort of defamation saved by **Charter** s. 1? What arguments are there for and against the proposition that any defence to defamation law should be resolved under s. 1, and not under s. 2(b)?

2. Consider the application to this issue of R.W.D.S.U. v. Dolphin Delivery,[1986] 2 S.C.R. 537 where the Supreme Court of Canada held that the Charter does not apply to private litigation between private parties, if the government is not a party, and no legislation is impugned. If followed, that case would appear to suggest that a purely common law tort of defamation would

not be susceptible to **Charter** scrutiny. Does this make sense? Is there a valid ground for distinguishing Dolphin? Should a party, contesting the constitutionality of defamation law, simply argue that Dolphin is wrongly decided?

3. Richard J. decided to reject the American approach to the application of free speech to civil defamation law, as set out in New York Times v. Sullivan, on the basis that Canadian courts have "weighed more heavily the value of personal reputation over those of free speech and free press." How ought the adoption of the Charter affect this calculation? On what basis can a Canadian court form an informed opinion that Canadians give greater priority to individual reputation than do Americans? Would this comparison be borne out if one compared damage awards in Ontario libel actions to damage awards in similar cases tried in California courts?

4. Should the personal reputations of public figures receive the same protection as private individuals? Note that in New York Times v. Sullivan supra, the status of the plaintiff was that he was a public official. Subsequent cases have extended the doctrine to "public figures" who are involved in issues in which the public has a justified and important interest. See Curtis Publishing Co. v. Butts and Associated Press v. Walker, decided together at 388 U.S. 130 (1967). In Butts the Saturday Evening Post claimed that the University of Georgia athletic director (and former football coach) had fixed a football game. In Walker, AP reported that the plaintiff, a retired general, had led a violent crowd in opposition to the enforcement of a desegregation order at the University of Mississippi.

5. If the class of public figures is extended beyond public officials, is it possible to draw a meaningful line between those plaintiffs governed by the Sullivan rule, and those who are not? The media often view a "public figure" as being a person who has become newsworthy, in the sense that his or her conduct has become the focus of actual or perceived public interest. By this approach, a private citizen can suddenly become a "public figure" to the media, simply because their status or dconduct has suddenly become the focus of public attention for a short time. Should the "public figure" concept in the free speech/defamation context be extended this far? Would such an extension simply enable the media to insulate itself from defamation proceedings, by first making a person into a public figure through extensive news coverage, and then by invoking a Sullivan-type rule to defend its conduct?

5. The current Chief Justice of Canada gave a hint as to his views on these issues in Snyder v. The Montreal Gazette (1988), 49 D.L.R. (4th) 17 (S.C.C.), a case which considered the appropriate quantum of damages to be awarded a prominent public figure for non-pecuniary loss in a defamation action. As the defamation occured in 1975, the Charter was not applicable directly, and the case turned largely on common law issues. However, Justice Lamer (as he then was) commented as follows in his dissenting judgement:

"Though it is a secondary consideration, there is one factor that must be taken into account in defamation cases. These often involve newspapers, press agencies and radio or television stations. In coming to the rescue of a defamation victim, the courts must not overlook the fact that the written and spoken press is indispensable and is an essential component of a free and democratic society. Moreover, both the Quebec and Canadian Charters recognize the importance of the press.... If information agencies are ordered to pay large amounts as the result of a defamation the danger is that their operations will be paralyzed or indeed, in some cases, that their very existence may be endangered. Although society undoubtedly places a great value on the reputation of its members, that value, as it is subjective, cannot be so high as to threaten the functioning or the very existence of the press agencies which are essential to preserve a right guaranteed by the **Charter**."

6. If it were to be adopted in Canada, how should New York Times v. Sullivan be applied in situations where an otherwise private individual is thrust into the limelight? The U.S. Supreme Court considered this issue in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) where the plaintiff was a lawyer who acted in a civil suit for the family of an individual shot by a Chicago City policeman. Gertz brought suit when a magazine published by the John Birch Society alleged that he had been part of a communist frameup which led to the policeman's conviction for murder. Gertz was a reputable lawyer, was not involved in the criminal proceedings, and had not discussed the matter with the press. The Court held that New York Times v. Sullivan did not apply, limiting the category of public figures as follows:

"For the most part [public figures are] those who attain this status [by assuming] roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classes as public figures thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."

7. The foregoing discussion has assumed throughout that a plaintiff in a defamation action is a human being, seeking the vindication of his or her reputation. Should the **Charter**'s approach to defamation actions change if the plaintiff is a for-profit corporation? What interests are served by legal protection for the reputation of a business corporation? Are these interests as compelling as those protected by defamation law's umbrella over the good name of individuals? What test would be appropriate for determining the applicability of defamation law to a corporate plaintiff?

8. Assume that "Air Today, Gone Tomorrow Inc." is a non-profit charitable corporation, involved in the investigation of and publication of incidents of air pollution and other environmental hazards. After an investigation, it disseminated a pamphlet to the public which

charges Ironmanco Ltd., a multi-national iron company, with wilfully dumping toxic waste into local waterways. For good measure, Ironmanco responds by circulating a pamphlet and publishing a newspaper advertisement which both claim that Air Today, Gone Tomorrow is nothing more than a front for Ironmanco's major iron-producing competitor. The environmental group sues both Ironmanco and the Daily Bugle newspaper for libel, alleging that the anti-environmental pamphlet and newspaper advertisement was scandalous and unture. Ironmanco countersues the environmental group, alleging that its pamphlet was defamatory. What standard should apply to each of these defamation claims under the Charter?

9. Assume that the U.B.S. TV Network nightly news runs a lead story, during which the government of the City of Hillsborough is accused of deliberately enforcing municipal bylaws with intesified vigour against members of racial minorities, for the purpose of dissuading minority members from moving to that city. The City Council has acquired compelling, fully-admissible evidence to show that this news item was cooked, and was entirely falsified, to the manifest nowledge of the U.B.S. reporter and anchorperson. A civil defamation action is launched against U.B.S., the anchorperson and reporter, in which the Corporation of the City of Hillsborough is named as the sole plaintiff. Damages are claimed in the amount of $10,000,000. Defence counsel argues that because the plaintiff is a government corporation, the media outlet has an absolute privilege to criticize its conduct, pursuant to the **Charter**. What arguments are there for and against this position?

10. In "The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place" 101 Harvard Law Review 1286, Judge Pierre Leval of the U.S. District Court argues that the First Amendment defamation standard should be altered from the Sullivan test of actual malice in cases where the plaintiff seeks no damages, but seeks instead only to secure a court declaration that the plaintiff has been libelled. Does this position have merit under the **Charter**?

11. In contrast to defamation actions which allege the publication of false statements, can the press be sued for an "invasion of "privacy", for publishing truthful statments? For example, can the media be held civilly liable for reporting true information about the plaintiff's personal life that are an embarrassing invasion of privacy and not newsworthy? See Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) whether a father sued a T.V. station for broadcasting the fact that his daughter had been a rape victim. The Court held that civil liability in a privacy action could not be imposed for truthfully publishing information released to the public in official court records. To what extent do protection of reputation and protection of privacy command equal respect in our law? Are each of equal importance as a justification for limiting freedom of expression?

12. What scope has a provincial legislature to enact a statute, creating a cause of action for damages, where a statement is published about a person which holds him or her up to a "false light", e.g. by falsely stating that the plaintiff has achieved some important success or accomplishment which he or she has not in fact ever achieved? See Time Inc. v. Hill 385 U.S.

374, 87 S.Ct. 534 (1967), where the U.S. Supreme Court held as follows (per Brennan J.):

> The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press. [We] have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. ... We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to non-defamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or [portrait]. ...
>
> We find applicable here the standard of knowing or reckless falsehood not through blind application of New York Times, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals. [at 542-3].

The Charter and Criminal Proceedings Over Questions of Truth and Falsehood:

R. v. Zundel [1992] 2 S.C.R. 731

The accused was charged with spreading false news contrary to s. 181 of the Criminal Code, which provides that "[e]very one who wilfully publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment . . .". The charge arose out of the accused's publication of a pamphlet entitled "Did Six Million Really Die"? The accused had added a preface and afterword to an original document, which had previously been published by others in the United States and England. The pamphlet, part of a genre of literature known as "revisionist history", suggests, inter alia, that the killing of six million Jews before and during

on the extreme periphery of the protected right must be brought within the protective ambit of s. 2(b).

The second step of the test is to determine whether the purpose of the impugned legislation is to restrict freedom of expression. Here, the purpose of s. 181 is to restrict, not all lies, but only those that are wilfully published and that are likely to injure the public interest. Although the targeted expression is extremely limited, the provision does have as its purpose the restriction of free expression.

Accordingly, it must be found that s. 181 constitutes an infringement of the freedom of expression guaranteed under s. 2(b) of the Charter.

Before turning to s. 1 of the Charter, it is important to recall what has been written concerning the weight to be attached to other Charter provisions and the consideration of contextual factors. In Keegstra, supra, Dickson C.J., wrote at p. 734:

> I believe, however, that s. 1 of the Charter is especially well suited to the task of balancing, and consider this Court's previous freedom of expression decisions to support this belief. It is, in my opinion, inappropriate to attenuate the s. 2(b) freedom on the grounds that a particular context requires such; the large and liberal interpretation given the freedom of expression in Irwin Toy indicates that the preferable course is to weigh the various contextual values and factors in s. 1.

(The s. 1 discussion is omitted.)

Notes and Questions

1. The Ontario Court of Appeal had held that false expression is not protected by s.2(b). Do you agree with McLachlin, J. that expressive activity that is not true can have social utility? What arguments for and against this proposition might be advanced in addition to those considered by the court?

2. Did Irwin Toy address itself to the question of s. 2(b) and false expression? Was it even in issue in that case?

3. Is there a difference from the s. 2(b) perspective between false speech on the one hand, and deliberately false speech on the other?

4. The dissenters claim to use a different approach for reaching the conclusion that s. 2(b) protects false expression in issue in this case than that used by the majority. What is the

difference in their approaches?

5. Should the **Charter** only protect expressive activity that is considered "socially useful"? Whose perception of social value, truth or worth Who should be the final judge of a statement's social utility, the courts, the legislature, or individual members of the public? should govern? If a legislative majority is free to impose its own version of social orthodoxy, what is the point in protecting freedom of expression under the Constitution?

6. Is Salman Rushdie's portrayal of the Islamic faith "untrue"? Should it therefore be censored?

7. What about disbarred lawyer Kopyto's accusation that the "courts and RCMP are sticking so close together you'd think they were put together with Krazy Glue"? Is an accusation of that kind patently false, patently true, or a matter of perception? Is it a question of fact or a matter of opinion? Does it make any difference which it is? See R. v. Kopyto (1987), 62 O.R. (2d) 449 [Ontario Court of Appeal decision reversing a conviction for contempt of court.]

8. Suppose one is ludicrous enough to believe that the earth is flat, and seeks to persuade others of that view. What state interests would be served by punishing a person for that view?

9. Zundel was subject to a criminal prosecution. Would the **Charter**'s impact be different if his conduct had been the subject of a civil action for damages by Holocaust survivers? What if the civil proceeding was brought exclusively for a declaration?

10. Zundel was convicted under a Criminal Code provision which required the Crown to establish before a jury beyond a reasonable doubt that Zundel's statements were in fact false, and that Zundel knew his statements to be false. Would this criminal burden satisfy the Sullivan test? Is it sufficient to ensure that constitutionally protected expression will not be chilled? How can this "chilling effect" be documented by a court, short of mere judicial speculation?

11. Would the answers to the preceeding questions be different if the Crown could obtain a conviction by proving beyond a reasonable doubt that Zundel was simply reckless as to the probable falsity of his statements?

12. Compare this discussion of prosecution for "false news" dissemination with the discussion later in these materials of the relationship between hate propaganda laws and **Charter** s. 2(b). Are there material differences, from the **Charter**'s perspective, between prosecutions for breach of the "false news" law, and prosecutions for contravention of the Criminal Code's hate propaganda provisions.

13. At Zundel's trial, the Crown unsuccessfully sought to have the court take judicial notice of the existence of the Holocaust, in order to dispense with the need to actually prove that it

happened through sworn testimony. Ordinarily, a court can take judicial notice of facts which are either universally known, or capable of ready proof through resort to sources of uncontested authority. What impact if any should the **Charter**'s free expression guarantee have on the availability of judicial notice in such cases?

Hill v. Church of Scientology of Toronto and Manning
Supreme Court of Canada, unreported, released July 20, 1995

The judgment of Cory, La Forest, Gonthier, McLachlin, Iacobucci and Major JJ. was delivered by CORY J.:

On September 17, 1984, the appellant Morris Manning, accompanied by representatives of the appellant Church of Scientology of Toronto ("Scientology"), held a press conference on the steps of Osgoode Hall in Toronto. Manning, who was wearing his barrister's gown, read from and commented upon allegations contained in a notice of motion by which Scientology intended to commence criminal contempt proceedings against the respondent Casey Hill, a Crown attorney. The notice of motion alleged that Casey Hill had misled a judge of the Supreme Court of Ontario and had breached orders sealing certain documents belonging to Scientology. The remedy sought was the imposition of a fine or the imprisonment of Casey Hill.

At the contempt proceedings, the allegations against Casey Hill were found to be untrue and without foundation. Casey Hill thereupon commenced this action for damages in libel against both Morris Manning and Scientology. On October 3, 1991, following a trial before Carruthers J. and a jury, Morris Manning and Scientology were found jointly liable for general damages in the amount of $300,000 and Scientology alone was found liable for aggravated damages of $500,000 and punitive damages of $800,000.

Two major issues are raised in this appeal. The first concerns the constitutionality of the common law action for defamation. The second relates to the damages that can properly be assessed in such actions. Let us first review the appellants' submissions pertaining to defamation actions. The appellants contend that the common law of defamation has failed to keep step with the evolution of Canadian society. They argue that the guiding principles upon which defamation is based place too much emphasis on the need to protect the reputation of plaintiffs at the expense of the freedom of expression of defendants. This, they say, is an unwarranted restriction which is imposed in a manner that cannot be justified in a free and democratic society. The appellants add that if the element of government action in the present case is insufficient to attract Charter scrutiny under s. 32, the principles of the common law ought, nevertheless, to be interpreted, even in a purely private action, in a manner consistent with the Charter. This, the appellants say, can only be achieved by the adoption of the "actual malice" standard of liability

When the common law is in conflict with Charter values, how should the competing principles be balanced? In my view, a traditional s. 1 framework for justification is not appropriate. It must be remembered that the Charter "challenge" in a case involving private litigants does not allege the violation of a Charter right. It addresses a conflict between principles. Therefore, the balancing must be more flexible than the traditional s. 1 analysis undertaken in cases involving governmental action cases. Charter values, framed in general terms, should be weighed against the principles which underlie the common law. The Charter values will then provide the guidelines for any modification to the common law which the court feels is necessary.

Finally, the division of onus which normally operates in a Charter challenge to government action should not be applicable in a private litigation Charter "challenge" to the common law. This is not a situation in which one party must prove a prima facie violation of a right while the other bears the onus of defending it. Rather, the party who is alleging that the common law is inconsistent with the Charter should bear the onus of proving both that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified. In the ordinary situation, where government action is said to violate a Charter right, it is appropriate that the government undertake the justification for the impugned statute or common law rule. However, the situation is very different where two private parties are involved in a civil suit. One party will have brought the action on the basis of the prevailing common law which may have a long history of acceptance in the community. That party should be able to rely upon that law and should not be placed in the position of having to defend it. It is up to the party challenging the common law to bear the burden of proving not only that the common law is inconsistent with Charter values but also that its provisions cannot be justified.

With that background, let us first consider the common law of defamation in light of the values underlying the Charter. The Nature of Actions for Defamation: The Values to be balanced
There can be no doubt that in libel cases the twin values of reputation and freedom of expression will clash. As Edgerton J. stated in Sweeney v. Patterson, 128 F.2d 457 (D.C. Cir. 1942), at p. 458, cert. denied 317 U.S. 678 (1942), whatever is "added to the field of libel is taken from the field of free debate". The real question, however, is whether the common law strikes an appropriate balance between the two. Let us consider the nature of each of these values.

Freedom of Expression

Much has been written of the great importance of free speech. Without this freedom to express ideas and to criticize the operation of institutions and the conduct of individual members of government agencies, democratic forms of government would wither and die.

However, freedom of expression has never been recognized as an absolute right. Duff C.J. emphasized this point in Reference re Alberta Statutes, supra, at p. 133:

The right of public discussion is, of course, subject to legal restrictions; those based upon

> considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the law of defamation and sedition are concerned. In a word, freedom of discussion means . . . "freedom governed by law." [Emphasis added.]

See also Cherneskey v. Armdale Publishers Ltd., [1979] 1 S.C.R. 1067, at pp. 1072 and 1091.

Similar reasoning has been applied in cases argued under the Charter. Although a Charter right is defined broadly, generally without internal limits, the Charter recognizes, under s. 1, that social values will at times conflict and that some limits must be placed even on fundamental rights. As La Forest J. explained in United States of America v. Cotroni, [1989] 1 S.C.R. 1469, at p. 1489, this Court has adopted a flexible approach to measuring the constitutionality of impugned provisions wherein "the underlying values [of the Charter] are sensitively weighed in a particular context against other values of a free and democratic society

In R. v. Keegstra, [1990] 3 S.C.R. 697, for example, s. 319(2) of the Criminal Code was found to be justified as a reasonable limit on the appellant's freedom to spread falsehoods relating to the Holocaust and thus to promote hatred against an identifiable group. Dickson C.J. adopted the contextual approach to s. 1 and concluded that, since hate propaganda contributed little to the values which underlie the right enshrined under s. 2(b), namely the quest for truth, the promotion of individual self-development, and participation in the community, a restriction on this type of expression might be easier to justify than would be the case with other kinds of expression.

In R. v. Butler, [1992] 1 S.C.R. 452, the obscenity provisions of the Criminal Code, R.S.C., 1985, c. C-46, s. 163, were questioned. It was held, under the s. 1 analysis, that pornography could not stand on an equal footing with other kinds of expression which directly engage the "core" values of freedom of expression. Further, it was found that the fact that the targeted material was expression motivated by economic profit more readily justified the imposition of restrictions.

Certainly, defamatory statements are very tenuously related to the core values which underlie s. 2(b). They are inimical to the search for truth. False and injurious statement cannot enhance self-development. Nor can it ever be said that they lead to healthy participation in the affairs of the community. Indeed, they are detrimental to the advancement of these values and harmful to the interests of a free and democratic society. This concept was accepted in Globe & Mail Ltd. v. Boland, [1960] S.C.R. 203, at pp. 208-9, where it was held that an extension of the qualified privilege to the publication of defamatory statements concerning the fitness for office of a candidate for election would be "harmful to that 'common convenience and welfare of society'". Reliance was placed upon the text Gatley on Libel and Slander (4th ed. 1953), at p. 254, wherein the author stated the following:

It would tend to deter sensitive and honourable men from seeking public positions of trust and

> responsibility, and leave them open to others who have no respect for their reputation.

See also Derrickson v. Tomat (1992), 88 D.L.R. (4th) 401 (B.C.C.A.), at p. 408. The other value to be balanced in a defamation action is the protection of the reputation of the individual. Although much has very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation.

Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

From the earliest times, society has recognized the potential for tragic damage that can be occasioned by a false statement made about a person. This is evident in the Bible, the Mosaic Code and the Talmud. As the author Carter-Ruck, in Carter-Ruck on Libel and Slander (4th ed. 1992), explains at p. 17:

> The earliest evidence in recorded history of any sanction for defamatory statements is in the Mosaic code. In Exodus XXII 28 we find 'Thou shalt not revile the gods nor curse the ruler of thy people' and in Exodus XXIII 1 'Thou shalt not raise a false report: put not thine hand with the wicked to be an unrighteous witness'. There is also a condemnation of rumourmongers in Leviticus XIX 16 'Thou shalt not go up and down as a talebearer among thy people'.

To make false statements which are likely to injure the reputation of another has always been regarded as a serious offence. During the Roman era, the punishment for libel varied from the loss of the right to make a will, to imprisonment, exile for life, or forfeiture of property. In the case of slander, a person could be made liable for payment of damages.

It was decreed by the Teutons in the Lex Salica that if a man called another a "wolf" or a "hare", he must pay the sum of three shillings; for a false imputation of unchastity in a woman the penalty was forty-five shillings. In the Normal Costumal, if people falsely called another "thief" or "manslayer", they had to pay damages and, holding their nose with their fingers, publicly confess themselves a liar.

With the separation of ecclesiastical and secular courts by the decree of William I following the

Norman conquest, the Church assumed spiritual jurisdiction over defamatory language, which was regarded as a sin. The Church "stayed the tongue of the defamer at once pro custodia morum of the community, and pro salute animae of the delinquent". See V.v. Veeder, "The History and Theory of the Law of Defamation" (1903), 3 Colum. L. Rev. 546, at p. 551.

By the 16th century, the common law action for defamation became commonplace. This was in no small measure due to the efforts of the Star Chamber to eradicate duelling, the favoured method of vindication. The Star Chamber even went so far as to punish the sending of challenges. However, when it proscribed this avenue of recourse to injured parties, the Star Chamber was compelled to widen its original jurisdiction over seditious libel to include ordinary defamation.

The modern law of libel is said to have arisen out of the case De Libellis Famosis (1605), 5 Co. Rep. 125a, 77 E.R. 250. There, the late Archbishop of Canterbury and the then Bishop of London were alleged to have been "traduced and scandalized" by an anonymous person. As reported by Coke, it was ruled that all libels, even those against private individuals, ought to be sanctioned severely by indictment at common law or in the Star Chamber. The reasoning behind this was that the libel could incite "all those of the same family, kindred, or society to revenge, and so tends per consequens to quarrels and breach of the peace". It was not necessary to show publication to a third person and it made no difference whether the libel was true or whether the plaintiff had a good or bad reputation. Eventually, truth was recognized as a defence in cases involving ordinary defamation.

It was not until the late 17th century that the distinction between libel and slander was drawn by Chief Baron Hale in King v. Lake (1670), Hardres 470, 145 E.R. 552, where it was held that words spoken, without more, would not be actionable, with a few exceptions. Once they were reduced to writing, however, malice would be presumed and an action would lie.

The character of the law relating to libel and slander in the 20th century is essentially the product of its historical development up to the 17th century, subject to a few refinements such as the introduction and recognition of the defences of privilege and fair comment. From the foregoing we can see that a central theme through the ages has been that the reputation of the individual is of fundamental importance. As Professor R. E. Brown writes in The Law of Defamation in Canada (2nd ed. 1994), at p. 1-4:

> "No system of civil law can fail to take some account of the right to have one's reputation untarnished by defamation." Some form of legal or social constraints on defamatory publications "are to be found in all stages of civilization, however imperfect, remote, and proximate to barbarism." [Footnotes omitted.]

Though the law of defamation no longer serves as a bulwark against the duel and blood feud, the protection of reputation remains of vital importance. As David Lepofsky suggests in

> "Making Sense of the Libel Chill Debate: Do Libel Laws 'Chill' the Exercise of Freedom of Expression?" (1994), 4 N.J.C.L. 169, at p. 197, reputation is the "fundamental foundation on which people are able to interact with each other in social environments". At the same time, it serves the equally or perhaps more fundamentally important purpose of fostering our self-image and sense of self-worth.

This sentiment was eloquently expressed by Stewart J. in Rosenblatt v. Baer, 383 U.S.

75 (1966), who stated at p. 92:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being a concept at the root of any decent system of ordered liberty.

In the present case, consideration must be given to the particular significance reputation has for a lawyer. The reputation of a lawyer is of paramount importance to clients, to other members of the profession and to the judiciary. A lawyer's practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness. It is the cornerstone of a lawyer's professional life. Even if endowed with outstanding talent and indefatigable diligence, a lawyer cannot survive without a good reputation. In his essay entitled "The Lawyer's Duty to Himself and the Code of Professional Conduct" (1993), 27 L. Soc. Gaz. 119, David Hawreluk described the importance of a reputation for integrity. At page 121, he quoted Lord Birkett on the subject:

> The advocate has a duty to his client, a duty to the Court, and a duty to the State; but he has above all a duty to himself and he shall be, as far as lies in his power, a man of integrity. No profession calls for higher standards of honour and uprightness, and no profession, perhaps, offers greater temptations to forsake them; but whatever gifts an advocate may possess, be they never so dazzling, without the supreme qualification of an inner integrity he will fall short of the highest . . .

Similarly, Esson J. in Vogel v. Canadian Broadcasting Corp., [1982] 3 W.W.R. 97

(B.C.S.C.), at pp. 177-78 stated:

> The qualities required of a lawyer who aspires to the highest level of his profession are various, but one is essential. That is a reputation for integrity. The programs were a massive attack upon that reputation. The harm done to it can never be wholly undone, and therefore the stigma so unfairly created will always be with the plaintiff.

When the details of the Vogel affair have faded from memory, what will remain in the minds of many people throughout Canada is a lurking recollection that he was the centre of a scandal

which arose out of his conduct in office.

Although it is not specifically mentioned in the Charter, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the Charter rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.

Further, reputation is intimately related to the right to privacy which has been accorded constitutional protection. As La Forest J. wrote in R. v. Dyment, [1988] 2 S.C.R. 417, at p. 427, privacy, including informational privacy, is "[g]rounded in man's physical and moral autonomy" and "is essential for the well-being of the individual". The publication of defamatory comments constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity. The protection of a person's reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression. In order to undertake the requisite balancing of values, let us first review the change to the existing common law proposed by the appellants.

The Proposed Remedy: Adopting the New York Times v. Sullivan "Actual Malice" Rule

In New York Times v. Sullivan, supra, the United States Supreme Court ruled that the existing common law of defamation violated the guarantee of free speech under the First Amendment of the Constitution. It held that the citizen's right to criticize government officials is of such tremendous importance in a democratic society that it can only be accommodated through the tolerance of speech which may eventually be determined to contain falsehoods. The solution adopted was to do away with the common law presumptions of falsity and malice and place the onus on the plaintiff to prove that, at the time the defamatory statements were made, the defendant either knew them to be false or was reckless as to whether they were or not.

At the outset, it is important to understand the social and political context of the times which undoubtedly influenced the decision in New York Times v. Sullivan, supra. The impugned publication was an editorial advertisement, placed in the appellant's newspaper, entitled "Heed Their Rising Voices". It criticized the widespread segregation which continued to dominate life in the southern states in the late 1950s and early 1960s. Prominent and well respected individuals, including Mrs. Eleanor Roosevelt, lent their name to the advertisement. It communicated information, recited grievances, protested abuses and sought financial support. The group or movement sponsoring the advertisement was characterized by Brennan J. as one "whose existence and objective are matters of the highest public interest and concern" (p. 266). Black J. described the controversy at the heart of the suit in the following terms at p. 294:

> One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that such a

practice is forbidden by the Fourteenth Amendment.

The advertisement did not mention by name the plaintiff, who was a white elected commissioner from Montgomery, Alabama. Only 35 copies of the edition of the New York Times which carried that advertisement were circulated in Montgomery, and only 394 were circulated in the entire state of Alabama. The trial took place in 1960, in a segregated court room in Montgomery, before a white judge and all-white jury. Damages of $500,000 U.S. were awarded. This would be the current equivalent in Canada of approximately $3.5 million.

The Supreme Court, in overturning the verdict, clearly perceived the libel action as a very serious attack not only on the freedom of the press but, more particularly, on those who favoured desegregation in the southern United States. It was concerned that such a large damage award could threaten the very existence of, in Black J.'s words, "an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials" (p. 294). This concern was intensified by the fact that a second libel verdict of $500,000 U.S. had already been awarded to another Montgomery commissioner against the New York Times. In addition, 11 other libel suits, arising out of the same advertisement, were pending against the newspaper.

Another motivating factor for this radical change to the common law was the American jurisprudence to the effect that the statements of public officials, which came "within the outer perimeter of their duties", were privileged unless actual malice was proved. The rationale behind this privilege was that the threat of damage suits would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties": Barr v. Matteo, 360 U.S. 564 (1959), at p. 571. The Supreme Court in the Sullivan decision held that analogous considerations supported the protection which it accorded to critics of the government.

Critiques of the "Actual Malice" Rule - Comments on the Decision in the United States

The "actual malice" rule has been severely criticized by American judges and academic writers. It has been suggested that the decision was overly influenced by the dramatic facts underlying the dispute and has not stood the test of time. Commentators have pointed out that, far from being deterred by the decision, libel actions have, in the post-Sullivan era, increased in both number and size of awards. They have, in this way, mirrored the direction taken in other tort actions. It has been said that the New York Times v. Sullivan, supra, decision has put great pressure on the fact-finding process since courts are now required to make subjective determinations as to who is a public figure and what is a matter of legitimate public concern. See G. Christie, supra, at pp. 63-64.

Perhaps most importantly, it has been argued the decision has shifted the focus of defamation suits away from their original, essential purpose. Rather than deciding upon the truth of the impugned statement, courts in the U.S. now determine whether the defendant was negligent.

Several unfortunate results flow from this shift in focus. First, it may deny the plaintiff the opportunity to establish the falsity of the defamatory statements and to determine the consequent reputational harm. This is particularly true in cases where the falsity is not seriously contested. See R. Bezanson, supra, at p. 227.

Second, it necessitates a detailed inquiry into matters of media procedure. This, in turn, increases the length of discoveries and of the trial which may actually increase, rather than decrease, the threat to speech interests. See D. Barrett, "Declaratory Judgments for Libel: A Better Alternative" (1986), 74 Cal. L. Rev. 847, at p. 855.

Third, it dramatically increases the cost of litigation. This will often leave a plaintiff who has limited funds without legal recourse.

Fourth, the fact that the dissemination of falsehoods is protected is said to exact a major social cost by deprecating truth in public discourse. A number of jurists in the United States have advocated a reconsideration of the New York Times v. Sullivan standard. These include one of the justices of the Supreme Court who participated in that decision. In Dun & Bradstreet, Inc., supra, White J. stated, in a minority concurring opinion with which Burger C.J. concurred on this point, that he had "become convinced that the Court struck an improvident balance in the New York Times case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation" (p. 767). He went on to state at pp. 767-69:

In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials.

> On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in Gertz: "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."

> Yet in New York Times cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand and the public continue to be misinformed about public matters. . . .

> Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality. The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment interests.
>
> Also, by leaving the lie uncorrected, the New York Times rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting "our basic concept of the essential dignity and worth of every human being a concept at the root of any decent system of ordered liberty." The New York Times rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results. [Emphasis added.]

In the subsequent case of Coughlin v. Westinghouse Broadcasting & Cable, Inc., 476 U.S. 1187 (1986), the majority of the United States Supreme Court refused to grant certiorari. Burger C.J. and Rehnquist J. dissented because of their view that the court should re-examine New York Times v. Sullivan, supra, and "give plenary attention to this important issue" (p. 1187).

Consideration of the Actual Malice Rule in the United Kingdom

The courts in England have refused to adopt the "actual malice" standard. In Derbyshire County Council v. Times Newspapers Ltd., [1993] 1 All E.R. 1011, the House of Lords considered an action brought by a municipal council against the publisher of a Sunday newspaper. The claim for damages, which was denied, arose from articles concerning the authority's management of its superannuation fund. In his reasons, Lord Keith stated that public interest considerations similar to those underlying the New York Times v. Sullivan, supra, decision were involved in that it was "of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism". However, the appropriateness of the "actual malice" standard was not considered and it was not incorporated into the law of England. In fact, Lord Keith stated that if the individual reputation of any of the local councillors had been wrongly damaged by the impugned publication, they could have brought an action for defamation in their personal capacity. The Australian Position on Actual Malice : The Australian case of Theophanous v. Herald and Weekly Times Ltd (1994), 124 A.L.R. 1 (H.C.) considered an action brought by a member of that country's House of Representatives in response to a letter to the editor of a local newspaper which was critical of his

views. Although a plurality of the seven judges sitting on the High Court held that the existing law of defamation curtailed the constitutionally protected right to political discussion, it rejected the adoption of the "actual malice" standard, stating at pp. 22-23:

> Even assuming that, in conformity with Sullivan, the test is confined to plaintiffs who are public officials, in our view it gives inadequate protection to reputation.
>
> The protection of free communication does not necessitate such a subordination of the protection of individual reputation as appears to have occurred in the United States.

The Position Taken By International Law Reform Commissions

International law reform organizations have also criticized the New York Times v. Sullivan rule. The Australian Law Reform Commission's Report No. 11 (the Kirby Committee Report) (1979) criticized the concept of "public official" on the basis that "a minor elected official or public servant [would be] in a more vulnerable position than a prominent businessman" (p. 252). The Report of the Committee on Defamation (the Faulks Committee Report) (1975) held that the rule "would in many cases deny a just remedy to defamed persons" (p. 169). Finally, the Irish Law Reform Commission's Report on the Civil Law of Defamation (the Keane Final Report) stated that "while the widest possible range of criticism of public officials and public figures is desirable, statements of fact contribute meaningfully to public debate only if they are true" (p. 82).

Conclusion: Should the Law of Defamation be Modified by Incorporating the Sullivan Principle?

The New York Times v. Sullivan, supra, decision has been criticized by judges and academic writers in the United States and elsewhere. It has not been followed in the United Kingdom or Australia. I can see no reason for adopting it in Canada in an action between private litigants. The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements. It is the means by which the individual may protect his or her reputation which may well be the most distinguishing feature of his or her character, personality and, perhaps, identity. I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish. The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility.

The Canadian Daily Newspaper Association indicated, in its response to A Consultation Draft of the General Limitations Act (September 1991) at p. 3, that the law of libel is "a carefully-crafted regime" which has "functioned fairly for the media and for complainants for many years".

Freedom of speech, like any other freedom, is subject to the law and must be balanced against the essential need of the individuals to protect their reputation. The words of Diplock J. in Silkin v. Beaverbrook Newspapers Ltd., [1958] 1 W.L.R. 743, at pp. 745-46, are worth repeating:

> Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between, on the one hand, the right of the individual whether he is in public life or not, to his unsullied reputation if he deserves it, and on the other hand the right of the public to express their views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people.

None of the factors which prompted the United States Supreme Court to rewrite the law of defamation in America are present in the case at bar. First, this appeal does not involve the media or political commentary about government policies. Thus the issues considered by the High Court of Australia in Theophanous, supra, are also not raised in this case and need not be considered.

Second, a review of jury verdicts in Canada reveals that there is no danger of numerous large awards threatening the viability of media organizations. Finally, in Canada there is no broad privilege accorded to the public statements of government officials which needs to be counterbalanced by a similar right for private individuals.

In conclusion, in its application to the parties in this action, the common law of defamation complies with the underlying values of the Charter and there is no need to amend or alter it.

Consideration must now be given to the submission made on behalf of Morris Manning that the defence of qualified privilege should be expanded to include reports upon pleadings and court documents that have been filed or are at the point of being filed.

Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. As Lord Atkinson explained in Adam v. Ward, [1917] A.C. 309, at p. 334:

> a privileged occasion is an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.

The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the bona fides of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the

plaintiff. However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice.

Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. pointed out in dissent in Cherneskey, supra, at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created.

Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded. As Loreburn E. stated at pp. 320-21 in Adam v. Ward, supra:

> the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected.

In other words, the information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given.

The principal question to be answered in this appeal is whether the recitation of the contents of the notice of motion by Morris Manning took place on an occasion of qualified privilege. If so, it remains to be determined whether or not that privilege was exceeded and thereby defeated.

The traditional common law rule with respect to reports on documents relating to judicial proceedings is set out in Gatley on Libel and Slander (8th ed. 1981), at p. 252, in these words:

> The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open court, then the publication without malice of a fair and accurate report of what takes place before that tribunal is privileged.

The rationale behind this rule is that the public has a right to be informed about all aspects of proceedings to which it has the right of access. This is why a news report referring to the contents of any document filed as an exhibit, or admitted as evidence during the course of the proceedings, is privileged. However, the common law immunity was not extended to a report on pleadings or other documents which had not been filed with the court or referred to in open court.

Both societal standards and the legislation have changed with regard to access to court

documents. When the qualified privilege rule was set out in Shallow, supra, court documents were not open to the public. Today, the right of access is guaranteed by legislative provision, in this case s. 137(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43. As well, s. 2(b) of the Charter may in some circumstances provide a basis for gaining access to some court documents. However, just as s. 137(1) provides for limitations on the right of access to court documents, so too is the s. 2(b) guarantee subject to reasonable limits that can be demonstrably justified in a free and democratic society. This Court's reasons in Canadian Newspapers Co. v. Canada (Attorney General), [1988] 2 S.C.R. 122, provide an illustration of the kind of restriction that has been upheld in relation to information flowing from court proceedings. In that case, the constitutionality of s. 442(3) of the Criminal Code was upheld. It imposed a publication ban on the identity of a complainant in sexual assault cases (or any information that might disclose her identity) upon the request of that complainant. There is no need to elaborate further on the scope of access, however, since it does not arise on the facts of this case. It is sufficient to observe that, in appropriate circumstances, s. 2(b) may provide the means to gain access to court documents. It follows that the concept of qualified privilege should be modified accordingly.

The public interest in documents filed with the court is too important to be defeated by the kind of technicality which arose in this case. The record demonstrates that, prior to holding the press conference, Morris Manning had every intention of initiating the contempt action in accordance with the prevailing rules, and had given instructions to this effect. In fact, the proper documents were served and filed the very next morning. The fact that, by some misadventure, the strict procedural requirement of filing the documents had not been fulfilled at the time of the press conference, should not defeat the qualified privilege which attached to this occasion.

This said, it is my conclusion that Morris Manning's conduct far exceeded the legitimate purposes of the occasion. The circumstances of this case called for great restraint in the communication of information concerning the proceedings launched against Casey Hill. As an experienced lawyer, Manning ought to have taken steps to confirm the allegations that were being made. This is particularly true since he should have been aware of the Scientology investigation pertaining to access to the sealed documents. In those circumstances he was duty bound to wait until the investigation was completed before launching such a serious attack on Hill's professional integrity. Manning failed to take either of these reasonable steps. As a result of this failure, the permissible scope of his comments was limited and the qualified privilege which attached to his remarks was defeated.

The press conference was held on the steps of Osgoode Hall in the presence of representatives from several media organizations. This constituted the widest possible dissemination of grievous allegations of professional misconduct that were yet to be tested in a court of law. His comments were made in language that portrayed Hill in the worst possible light. This was neither necessary nor appropriate in the existing circumstances. While it is not necessary to characterize Manning's conduct as amounting to actual malice, it was certainly highhanded and careless. It exceeded any legitimate purpose the press conference may have served. His conduct, therefore, defeated the

qualified privilege that attached to the occasion.

Scientology has alleged that the size of the award of punitive damages had a chilling effect on its right to freedom of expression. However as stated earlier, in spite of the slow and methodical progress of this case to trial and appeal, and despite the motion brought six years before the trial which drew attention to the need for evidence, Scientology adduced no evidence as to the chilling affect of the award. In its absence, this argument should not be considered. It may be that different factors will have to be taken into consideration where evidence is adduced and where a member of the media is a party to the action. However, those are considerations for another case on another day. Per L'HEUREUX-DUBE J.:

I have had the advantage of reading the reasons of my colleague Justice Cory and, except on one point, generally agree with them as well as with his disposition of this appeal. First, however, in order to dispel any possible confusion regarding the applicability of the Canadian Charter of Rights and Freedoms to the common law, I note that this issue can be easily summarized in the following two principles, both of which were first articulated by McIntyre J. in RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573:

1. The Charter does not directly apply to the common law unless it is the basis of some governmental action.

2. Even though the Charter does not directly apply to the common law absent government action, the common law must nonetheless be developed in accordance with Charter values. (To the same effect, see R. v. Salituro, [1991] 3 S.C.R. 654, Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, and R. v. Park, S.C.C. No. 23876, June 22, 1995, per l'Heureux-Dube J.).

In other words, the basic rule is that, absent government action, the Charter only applies indirectly to the common law.

In light of the above, I agree with Cory J. that where the common law is "challenged" on Charter grounds, a traditional s. 1 analysis will generally not be appropriate. Instead, "Charter values, framed in general terms, should be weighed against the principles which underlie the common law. The Charter values will then provide the guidelines for any modification to the common law which the court feels is necessary" As well, I agree with Cory J. that "the party who is alleging that the common law is inconsistent with the Charter should bear the onus of proving both that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified" Such an approach is, in my view, consistent with the fact that, absent government action, the Charter only applies indirectly to the common law.

Applying this approach in the case at hand, I agree with Cory J.'s conclusion that the common

law of defamation, as it is applied to the parties in this action, is consistent with the values enshrined in the Charter. Accordingly, I agree with my colleague that there is no need to amend or alter the common law. In particular, I agree that the "actual malice" rule adopted by the U.S. Supreme Court in New York Times v. Sullivan, 376 U.S. 254 (1964), should not be adopted into the Canadian common law of defamation.

Second, the one issue on which I part company with my colleague concerns the scope of the defence of qualified privilege. Traditionally, this Court has held that the defence of qualified privilege is available with respect to reports of judicial proceedings, but not with respect to reports of pleadings in purely private litigation upon which no judicial action has yet been taken:

Edmonton Journal struck down, in the name of freedom of expression, statutory provisions which sought to inhibit the publication of details of pending matrimonial and other civil actions. But it by no means follows that the publication of such details should be accorded the mantle of qualified privilege if they are defamatory.

Notes And Questions

1. In explaining the relationship of the Charter and common law rules, and the analysis to be applied in deciding whether a common law rule complies with Charter values in the context of civil litigation, the court states the following:

"Finally, the division of onus which normally operates in a Charter challenge to government action should not be applicable in a private litigation Charter "challenge" to the common law. This is not a situation in which one party must prove a prima facie violation of a right while the other bears the onus of defending it. Rather, the party who is alleging that the common law is inconsistent with the Charter should bear the onus of proving both that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified. In the ordinary situation, where government action is said to violate a Charter right, it is appropriate that the government undertake the justification for the impugned statute or common law rule.

However, the situation is very different where two private parties are involved in a civil suit. One party will have brought the action on the basis of the prevailing common law which may have a long history of acceptance in the community. That party should be able to rely upon that law and should not be placed in the position of having to defend it. It is up to the party challenging the common law to bear the burden of proving not only that the common law is inconsistent with Charter values but also that its provisions cannot be justified."

2. What impact should this principle have on the Dagenais case, where a civil injunction was sought by criminally accused private citizens, and the Charter was raised to oppose this injunction by corporate civil defendants? Is the analysis in Dagenais consistent with the approach articulated here?

3. In rejecting the American Sullivan rule, the court states: "Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish." Is this so? Why or why not? What would be a journalist's perspective on this comment? An author's?

4. This case did not involve a libel claim against a traditional news media outlet. The Supreme Court had the benefit of media intervention. Does this case apply in the case of a libel action against a news organization?

R. v. Lucas [1998] 1 S.C.R. 439, [1998] S.C.J. No. 28, File No.: 25177

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

A police officer investigated allegations of sexual abuse made by three children. As a result of the investigation, criminal charges were laid against a number of individuals, but many of the charges were subsequently withdrawn or stayed. During the course of his investigation, the officer had been informed that one of the children had sexually assaulted his sisters on numerous occasions and that the people who ran the special care foster home where the children had been placed were unable to stop him. However, as a result of his reliance upon the opinion of the children's therapist, the officer kept them together in the same home. The appellant Mr. L was active in a prisoners' rights group. Four of the individuals whose charges had been stayed provided him with all of the information and documentation they possessed regarding the charges. On the basis of these documents, the appellants apparently understood that one of the children had raped, sodomized and tortured one of his sisters and repeatedly participated in sexual activities with the other sister. They concluded that the officer had knowledge of what was transpiring and that he had a duty to intervene. As a result, the appellants and a small group of others picketed outside the provincial court and the police headquarters where the officer worked. Mrs. L was carrying a sign prepared by her husband which read on one side: "Did [the officer] just allow or help with the rape/sodomy of an 8 year old?" and on the other side: "If you admit it [officer] then you might get help with your touching problem." She was arrested and charged with defamatory libel under ss. 300 and 301 of the Criminal Code. The following day, Mr. L again picketed in front of the provincial court and police headquarters. This time, he carried a sign with a similar statement. He was subsequently arrested and also charged under ss. 300 and 301. At trial, the appellants argued that their freedom of expression as guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms had been infringed. The trial judge agreed

that ought to be extended to the media even in the exercise of their constitutionally protected function. The question is whether those limits have been breached in this case.

[para101] My colleague LeBel J., at para. 73, mentions five factors which lead him to conclude that a finding of civil fault should be made against the CBC, namely the incomplete and misleading manner in which the content of the letter was broadcast, the refusal to allow Mr. Néron time to verify his errors, the refusal to mention that he sought this time, the fact that Mr. Néron never wanted the content of the letter to be broadcast and the adverse conclusion of the CBC's ombudsman.

[para102] In my view, with respect, none of these factors (whether taken individually or cumulatively) are sufficient to support a finding of civil responsibility. ...

E. The Adverse Conclusions of the CBC's Ombudsman

[para108] The CBC's ombudsman criticised aspects of the January 12th broadcast. However the effort of media organizations to improve their standards of performance should not be discouraged by equating valid journalistic criticism with a finding of civil fault. The Ombudsman was not concerned with balancing the values of a free press and the respect for reputation. Nor was it within the Ombudsman's mandate to determine whether Mr. Néron's reputation would have fared better or worse had a higher standard of journalism been observed, given that the damaging sting would have remained even in a more balanced presentation, albeit more appropriately packaged. Rather, the Ombudsman was examining the second broadcast in light of the [TRANSLATION] "journalistic principles of accuracy, integrity and fairness". No doubt these principles are all relevant in the determination of reasonableness under art. 1457 C.C.Q., but they are not the only relevant principles. ...

[para110] What sets this case apart from the usual action in delict is its constitutional dimension, and the public's right to know, and the role of the press in discovering and getting the facts out into the public domain even though on occasion, as here, the presentation of the facts leaves something to be desired.

III. Disposition

[para111] In my view, a legal rule that awards $673,153 in damages to Mr. Néron and his personal company on the basis of a broadcast which stated true facts, the publication of which was undoubtedly in the public interest, just because other lesser matters might also have been mentioned but were not, or further context might have been provided but was not, is simply not consistent with the public's right to know. The position adopted by the majority in this case goes well beyond what was decided in Radio Sept-Îles and Prud'homme and, with respect, will result in an unnecessary chill on the free flow of information which ought to be characteristic of a free and democratic society. The reputation of Mr. Néron and his company have undoubtedly

suffered, but the real cause of their suffering was the conduct of their erstwhile client, the CNQ, which has already been held liable for the respondents' loss, and which did not appeal the question of its own liability to this Court....

NOTES AND QUESTIONS

1. What is the juridical grounding, if any, in the public's "right to know" referred to in this case?

2. Is there a quantifiable balance that a court can articulate between freedom of the press on the one hand, and individual reputation on the other?

3. Should an organization's status as a public broadcaster make a difference in the constitutional balancing?

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See also, RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, at p. 603. Traditionally, the freedom of expression enjoyed by the media has been considered no greater than that of other members of the Canadian community (Doyle v. Sparrow (1979), 27 O.R. (2d) 206 (C.A.), per MacKinnon A.C.J.O., at p. 208, leave to appeal refused, [1980] 1 S.C.R. xii). Nevertheless, it is worth noting that, s. 2(b) of the Charter specifically refers to "freedom of the press and other media of communication", presumably to underline their importance in our public life....

[39] Of course it is true that the comment must have "a basis" in the facts, but a requirement that the comment be "supported by the facts", read strictly, might be thought to set the bar so high as to create the potential for judicial censorship of public opinion. Even the assessment of "relevance" has in the past misled courts into asking whether the facts "warranted" the comment, or whether the comment "fairly" arose out of the facts (Vander Zalm), or other such judgmental evaluations. Insistence on a court's view of reasonableness and proportionality was thought to represent too great a curb on free expression, but it was not too much to ask a defamer to profess an honest belief in his or her defamatory comment. If the speaker, however misguided, spoke with integrity, the law would give effect to freedom of expression on matters of public interest.

[40] "Honest belief", of course, requires the existence of a nexus or relationship between the comment and the underlying facts. Dickson J. himself stated the test in Cherneskey as "could any man honestly express that opinion on the proved facts" (p. 1100; emphasis added). His various characterizations of "any man" show the intended broadness of the test, i.e. "however prejudiced he may be, however exaggerated or obstinate his views"(at p. 1103, citing Merivale v. Carson (1887), 20 Q.B.D. 275, at p. 281). Dickson J. also agreed with the comment in an earlier case that the operative concept was "honest" rather than 'fair' lest some suggestion of reasonableness instead of honesty should be read in" (p. 1104)....

Notes and Questions

1. What would have been needed to make this comment unfair comment?

2. Has the Court in effect constitutionalized the content of the tort of defamation? If so, is that inevitable?

3. What is the continued force of Hill v. Church of Scientology after this decision?

1. INTRODUCTION

This Chapter examines the status of commercial expression under the **Charter**. Our law is replete with extensive and intensive regulation of economic activities, aimed at protecting the public and ensuring orderly and fair practices in the economic marketplace. The idea of laisser faire in the sphere of economic and business activities in Canada is, at best, nothing but a fiction, in light of the thousands of pages of statutes and regulations which govern commercial activity. Moreover, the Supreme court of Canada held in Edwards Books and Art Ltd. v. the Queen, [1986] 2 S.C.R. 713 that business regulations do not impinge upon the **Charter's** values.

In this web of commercial regulation one finds a myriad of provisions regulating the form and content of advertising and other communications and activities related to the promotion, marketing, distribution and labelling of goods and services. The question presented in this chapter is whether and to what extent the **Charter** effects the validity of these provisions. Are they to be treated as a mere adjunct of the maze of commercial regulations, or as an unwarranted intrusion into freedom of expression.

This topic compels a vigourous consideration of the purposes for guaranteeing freedom of expression, and the extent to which an unpopular political dissident's speech, which condemns the government of the day, can be constitutionally equated with a television advertisement which explicitly or implicitly suggests that the sponsor's brand of beer will help virile men entice attractive women. It is fair to expect that commercial speech claims will be advanced with business profits at heart, and so the subject also leads to a consideration of how the charter impacts on economic regulation, and economic rights. In this area, the issues which merit consideration include among them the following:

(1) whether **Charter** s. 2(b) confers constitutional rights on corporations;

(2) whether commercial expression is protected by **Charter** s. 2(b), and if so, to what extent?

(3) what is meant by "commercial speech"?

(4) If commercial speech is protected by **Charter** s. 2(b), then what test is to be applied under **Charter** s. 1 to assess limits on commercial expression?

(5) What specific restrictions on commercial speech comply with s. 1?

Although the Supreme Court of Canada concluded that commercial expression is covered by S.2(b) in Ford v. A-G of Quebec, and reinforced that conclusion in Irwin Toy, it is worthwhile nonetheless to question that decision and examine the Court's reasons for extending the **Charter's** protection to pure commercial expression. Accordingly, the materials begin with the s. 2(b) rulings in Ford and Irwin Toy.

The issue which will attract the most attention at present, however, concerns the permissibility of limitations under section 1. The materials under this heading have been divided into four subsections: the first deals with a uniquely Canadian question - the extent to which the language of commercial expression in the form of commercial signs can be regulated in order to preserve and promote Quebec's linguistic distinctiveness. The second considers regulation of advertising targeted at children. The third addresses regulation of professional advertising and the fourth with restrictions on the solicitation of harmful or immoral conduct. In terms of professional advertising, the Supreme Court of Canada's recent decision in Rocket v. Royal College of Dental Surgeons raises a number of interesting questions. After considering some of those issues, the materials include a recent U.S. Supreme Court decision dealing with questionable advertising practices in the legal profession.

Equally interesting are restrictions on advertisements or the solicitation of activities that are considered harmful or immoral. The Supreme Court of Canada's recent decision upholding Criminal Code provisions prohibiting the solicitation of prostitution requires close examination. That decision is topical, because of its controversial application of s. 1 to the case's facts. The Posadas decision from the U.S. Supreme Court has been included because it deals with the question whether the advertising of an activity can be regulated when the activity itself is legal.

Cases dealing with the status of commercial expression raise an issue that was touched upon in previous chapters; i.e., whether all expressive activity should receive the same protection or whether, on the other hand, it is more appropriate to acknowledge a hierarchy of expressive freedom values. At present in Canada, the Oakes test is said to govern in all cases in which an initial breach of the **Charter** has been found. Is it realistic for the Supreme Court of Canada to cling to the concept of a universal and monolithic standard of justification? That question is particularly relevant in the context of commercial expression.

Notes and Questions

1. What reasons did the Supreme Court of Canada give for protecting commercial expression in Irwin Toy and Ford? Did those reasons persuade you that the majority decision in Klein and Dvorak was incorrect?

2. What about levels of scrutiny? Should the Supreme Court of Canada treat all categories of speech as equal, and apply the Oakes test in all cases of interference with expressive freedom? Alternatively, should the Court recognize a hierarchy of values? Would it be preferable for the Court to apply issue-specific standards of justification under s.1, like the U.S. Supreme Court does?

3. In Ford, the Supreme Court of Canada claims that the Oakes test and Central Hudson are very similar. Do you agree with that statement? Do you see any relevant differences between the Canadian and American tests?

4. How does one define "commercial expression"? Presumably it would include speech which proposes a commercial transaction. However, does it go further, and if so, how far? Does a message constitute "commercial expression" where a supermarket chain includes in an advertisement a list of suggestions of how to recycle packaging on products purchased from their stores? Would it include a T.V. ad which both promotes the purchase of eggs, and advocates that eggs are a healthy food to eat, despite the contrary claims of government public health officials?

5. Does **Charter** s.2(b) entitle producers of margarine to produce and sell yellow-coloured margarine, in a tint which resembles butter? In Institute for Edible Oil Foods et al. v. A.G. Ontario et al, (1987), 63 O.R. (2d) 436 (Ont. H.C.), an association of margarine producers challenged the constitutionality of the requirement in s.4 of the **Oleomargarine Act** that margarine be coloured either deep orange or white, unlike butter. Evidence suggested that this requirement leads consumers to often purchase butter rather than margarine, and that a repeal of this colour requirement would cause a shift in purchasing and consumption patterns leading millions of dollars to switch from the dairy industry to the margarine industry. Crown evidence suggested that Ontario's dairy industry is central to the province's agricultural industry. This industry is in a very precarious economic state, and requires extensive government support to survive. The Supreme Court of Ontario found that this colour restriction infringes **Charter** s.2(b) because "the manner in which a product is presented to the public - its size, shape, colour, texture, and any other distinguishing feature incorporated into the product itself - constitutes a form of advertising which, although different in type from advertising by words and pictures, is none the less a form of expression." It then held that this is a reasonable limit under s.1, needed to protect the Ontario dairy industry.

On appeal (1989), 71 O.R. (2d) 158 (Ont. C.A.) the Court doubted whether colouring constituted expression and affirmed that if so the legislation was justified pursuant to s.1. The Court of Appeal ruled as follows:

2. There is no doubt that "commercial" speech or communication of a commercial message is included within the freedom of expression in s. 2(b) of the Charter and that it is a freedom applicable to the one who receives as well as the one who transmits the message: Ford v. Quebec [supra]; Irwin Toy Ltd v. Quebec [supra].

3. Even if s. 4 of the Act has the purpose and effect of interfering with margarine manufacturers or sellers with respect to their communicating a desired commercial message, that message is one related to the use of a colour which is traditionally associated with the taste and nutrition of butter. Even if we accept that consumption of margarine does not have some of the detrimental health effects that recent research has shown to be associated with the consumption of butter, it is difficult to see how the restriction inhibits the health objective of convincing consumers that margarine has less potential to cause cardio-vascular disease than butter. In any case, it is difficult to see how the freedom of expression asked for in this case furthers the purposes for the guarantee of the freedom as suggested by the Supreme Court of Canada in Irwin Toy, supra, at p. 606, or Ford, supra, at pp. 618-9, i.e. search for truth, contribution to formulation of beliefs or to the effective operation of democratic institutions or the fulfillment of individual autonomy or of self-validation. We have serious doubt as to whether there is here a contravention of s. 2(b) of the Charter.

4. Even if the restriction here is a contravention of s. 2(b) of the Charter, it is a reasonable limit under s. 1 of the Charter. After articulating the very detailed tests set out in R. v. Oakes..., the Supreme Court of Canada has subsequently suggested that courts should not subject governmental choices to judicial preferences and thus to second-guess the choices of elected officials between competing economic claims of different economic groups in the private sector: Edwards Books and Art Ltd. v. The Queen (1986), 35 D.L.R. (4th) 1 at pp 44, 51-2...; Irwin Toy, supra, at pp. 625-6. However, even if we were to apply the Oakes test in detail, we would have to conclude that, considering the economic importance of the dairy industry, both with respect to size and with respect to the largely foreign-owned condition of the latter, we cannot conclude that the need for the restriction on the latter is other than substantial and pressing. Next, there is no doubt that the restriction is rationally related to the protection of the dairy industry. In applying the "least restrictive" test, we must note what was said earlier about courts not second-guessing legislatures, as well as the fact that there is no restriction on the promotion of the use of margarine in any other way. In fact, it may be that the health benefits of using margarine may be better promoted in distinguishing it from butter. This relates also to the proportionality test, because the restriction here does not preclude other means of promoting the consumption of margarine. That promotion is restricted as minimally as possible. Therefore, we conclude that even if there has been an infringement of s. 2(b) of the Charter, the legislative provision impugned here is a reasonable limit within the meaning of s. 1 of the Charter.

The Supreme Court of Canada denied leave to appeal from this decision.

6. Assuming that commercial expression is protected under **Charter** s. 2(b) pursuant to Ford and Irwin Toy, does **Charter** s. 2(b) also extend constitutional protection to false, misleading or deceptive advertising? Consider three fact situations:

> (a) Wesley Crusher Enterprises markets a toy rocketship which it advertises as being "proven safe for use by children of all ages". The claim is based on a study, done for WCE, which in fact demonstrated that young children face a serious risk of wounding themselves on sharp edges of the toy. WCE saw these test results, but chose to run the advertisement anyway. The T.V. network, running the ad, never checked its accuracy?
>
> (b) Assume in the foregoing situation that the testing was done by an independent consultant, which falsified the test results to wrongly show that the toy was safe, and then gave this false report to WCE. WCE relied on the report's apparent endorsement of the toy in drafting its advertisement. So did the T.V. network which ran the advertisement.
>
> (c) Assume instead that the independent consultant did the testing, and in fact proved the toy to be safe. The ad ran with the approval of WCE and the T.V. network relying on the results. It turns out later that the toy was defective and dangerous, and that an insufficient testing had been done by the consultant. A more effective testing method documents the toy's dangerousness, but this method was unknown to WCE, the consultant, and the T.V. network at the time.

Would civil or criminal proceedings for false advertising in any of these cases infringe the s. 2(b) rights of WCE or the T.V. network?

7. Was it necessary in Ford for the Supreme Court to address the broad question of the treatment of commercial speech under the **Charter**. Ford dealt with quebec's controversial language restrictions on public signs. Is the question of language distinct from commercial speech questions? Could s. 2(b) be construed to protect one's choice of language, even if **Charter** s. 2(b) does not protect commercial speech as such?

8. Ford and Irwin Toy essentially assume that s. 2(b) guarantees constitutional rights to corporations, and not merely to human beings. Ought this be so? Ought this be decided without some reasons? Does **Charter** s. 2(b) give the same rights to corporations as it does to human beings? do trade unions also have s. 2(b) rights, apart from those of their members? See further the consideration of this issue in the chapter on regulation of the electoral process.

Notes and Questions

1. Is there something unique about the language issue in Canada to make the standard employed by the court in Ford under s. 1 distinctive, or is it equally applicable in other kinds of commercial advertising cases?

2. The court suggests that it might uphold a law which gives French predominance on signs, as long as it is not exclusive. What is the difference between that option and the impugned law, from the perspective of s. 2(b) values? From the perspective of the promotion of the impugned law's social objectives?

3. Is this the kind of case where the court should be deferential to the legislature, as it was later to urge in Irwin Toy for cases where the law-makers seek to balance the competing interests of different social groups? Was the court deferential to the legislature here?

4. Why did the court take into account the purposes for freedom of expression when it determined that the impugned law's aims were sufficiently important to outweigh the guarantee of s. 2(b)?

b) Regulation of Advertising Aimed at Children:

Irwin Toy Ltd. v. Quebec (A.-G.), [1989] 1 S.C.R. 927

Dickson C.J. and Lamer and Wilson J.J.:-- ...

VII

Whether the limit on freedom of expression imposed by ss. 248 and 249 is justified under s. 9.1 of the Quebec Charter or s. 1 of the Canadian Charter

The issues raised in this part are as follows: (a) whether the meaning, role and effect of s. 9.1 of the Quebec Charter are essentially different from that of s. 1 of the Canadian Charter; (b) whether the scheme put into place by ss. 248 and 249 is so vague as not to constitute a "limit prescribed by law"; (c) whether the materials (hereinafter referred to as the s. 1 and s. 9.1 materials) relied on by the Attorney General of Quebec are relevant to justifying ss. 248 and 249 as a reasonable limit upon freedom of expression; and (d) whether the s. 1 and s. 9.1 materials justify banning commercial advertising directed at persons under thirteen years of age. ...

D. Whether the s. 1 and s. 9.1 materials justify banning commercial advertising directed at persons under thirteen years of age

Notes and Questions

1. On Irwin Toy's reasoning, would the law be upheld if it banned advertising targeted at children under the age of 16? 18?

2. The court states in Irwin Toy that it will be more deferential to government under s. 1, where the government is arbitrating between the interests of different groups in society. why should this be so? Does the government not always engage in such balancing? Does every **Charter** question arising in the criminal justice context balance the rights of accused persons, victims and the law-abiding public?

3. Assume that the nine other provinces placed no restrictions on advertising targeted at children. Should the court take this into account under s. 1? Why or why not?

4. What if a 12 year old child brought a challenge to the same legislation, arguing that it infringed his or her freedom of expression, including the right to receive information. Does Irwin Toy answer this claim?

5. Should the same s. 1 test apply to restrictions on commercial speech by corporations and commercial speech by individuals?

6. Assume that a law provides as follows:

> (1) Every television network shall ensure that in its advertising, there shall be a fair representation of men, and women, persons who have white skin and persons who do not, and persons with disabilities and persons who do not have disabilities.
>
> (2) The purpose of this provision is to help eradicate stereotypes respecting disadvantaged persons and groups in society, and in particular, those disadvantaged because of their sex, race or disability.
>
> (3) The Governor General in council may make regulations prescribing the meaning of the terms used in this provision.

Would this provision comply with the **Charter**? If not, what changes could be made to it, if any, to bring it into conformity with the **Charter**?

Notes and Questions

1. On its face, is there anything problematic about the Rocket/Price promotional? Can you think of any interest that would be served by prohibiting a promotion of this kind?

2. Is there any ambiguity in Justice McLachlin's approach to section 1? Specifically, she claims that not all expression is equally worthy of protection, and that not all infringements of free expression are equally serious. At the same time, however, she is unwilling to admit that it is necessary to adopt different standards of justification for different issues under section 1. Can she have it both ways? Why or why not?

3. Justice McLachlin also clearly indicates that expression designed only to increase profit is not as important as other kinds of expressive activity. Is there any difference between advertisements that promote one's professional stature, and advertisements that promote a particular political position, candidate or party? In other words, is self-interest and self-promotion only found in the economic sphere and not at all in the political sphere? Why then should commercial expression receive less protection than political expression?

4. What reasons do professional regulatory bodies give for placing restrictions on advertisements? Is the profession's interest in "public respect" a sufficient reason for limiting advertising activities? In passing advertising restrictions, to what extent to self-governing professional bodies appear to be attempting to protect the public, and to what extent do they appear to be trying to protect themselves? Assume that there was an entire ban on advertising by lawyers. Who would suffer from this requirement?

5. Precisely what is "professionalism": the right of any profession to protect its stature?

6. Does the delegation of authority to professional associations to regulate their members work effectively in protecting the public from misleading and unscrupulous practices? In other words, is there any reason to believe that the public is at greater risk of negligent or inadequate service as a result of advertising than in the past, under a ban on advertising? Is competition between dentists or lawyers or physicians inherently unprofessional, or inherently detrimental to the public?

7. Justice McLachlin agrees that advertising by professionals can be regulated because there is no way for the average consumer to evaluate claims of competence or expertise. How often do consumers evaluate the competence of professionals like dentists, doctors and lawyers, before invoking their services? Is the public more vulnerable or less vulnerable as the result of advertising?

8. In what circumstances should legislation that is invalid in the particular circumstances before the Court be read down, and in what circumstances should it be completely invalidated? For further discussion, see Peel v. Disciplinary Commission of Illinois.

9. Section 67(2) of the Health Disciplines Act provides that a health care provider can use the title "doctor" in the context of delivering health care to members of the public only if he or she is a physician, dentist, or optometrist. A podiatrist is a health care professional, trained in a U.S. school, who provides specialized foot care. Podiatrists are not physicians, but receive a degree called a "doctor of podiatric medicine". Does **Charter** s.2(b) entitle a podiatrist to call himself or herself "Dr. Peach" or to have their receptionist answer their phone "Doctor's Office"? If so, would s. 67(2) of the Health Disciplines Act be saved under **Charter** s.1? For example,in College of Physicians and Surgeons v. Larsen (1987), 62 O.R. (2d) 545 (Ont. H.C.), R.E. Holland J. stated:

> In my opinion, the prohibition complained of does not infringe Gary Larsen's right to express that qualification. It merely restricts the manner in which the qualification may be expressed. The subsection does not prevent him from communicating the nature and fact of his degree by the suffix D.P.M. or Doctor of Podiatric Medicine. Nor does it prevent him from using the prefix "Doctor" or "Dr." in matters unrelated to his practice of podiatric medicine. It merely restricts the use of these terms: "as an occupational designation relating to the treatment of human ailments or physical defects".
>
> Even had I come to the opposite conclusion, I would have found that the prohibition contained in the subsection can properly be supported by s. 1 of the Charter...
>
> On the evidence, there is a considerable degree of confusion in the minds of the public as to whether a podiatrist is a medical doctor. Logically, this confusion is contributed to by podiatrists' use of the prefix "Dr." in the context of the treatment of human ailments. The existence of this confusion gives rise to a serious potential for harm by depriving individuals, especially the elderly, of an informed choice as to whether they wish to be treated by a podiatrist, a physician or an orthopedic surgeon. ...
>
> The prohibition on the use of the title "Doctor" or "Dr." as an occupational designation deals directly with the problem of confusion which has been identified. Further, it leaves Gary Larsen free to express his degree as D.P.M. or Doctor of Podiatric Medicine as an occupational designation and to use the titles "Doctor" or "Dr." apart from his practice of podiatry. The prohibition, therefore, goes no further than is reasonably necessary to remove the confusion and the ensuing potential for harm. [at 552-4].

10. A chiropractor gives an interview to a newspaper reporter, in which he claims that through manipulation of the spine, he can cause the regeneration of spinal discs. The self-governing regulatory body for chiropractors, the Board of Directors of Chiropractic, brings disciplinary proceedings against him for breaching s.12(3) of the regulations under the **Drugless Practitioners Act** which prohibits "falsehood, misrepresentations, misleading or distorted statements as to bodily functions...or as to cures by any method of treatment used by him". Can he successfully invoke s. 2(b) in his defence? What evidence and arguments should the parties

tender?

11. Originally, the U.S. Supreme Court treated commercial speech as outside the reach of the First Amendment. This was reversed in the landmark case of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council 96 S.Ct. 1817 (1976), in which the U.S. Supreme Court invalidated a statute that made advertising of prescription drug prices "unprofessional conduct" and subjected pharmacists to the possibility of licence suspensions or revocations. Blackmun J., for the Court, commented as follows:

> Here,...the question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment. ...
>
> [S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. Speech likewise is protected even though it is carried in a form that is sold for profit. [Our] question is whether speech which does "no more than propose a commercial transaction," is so removed from any "exposition of ideas," and from "truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government" that it lacks all protections. Our answer is that it is not.
>
> Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him for protection under the First Amendment. ...
>
> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.
>
> Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial", may be of general public interest. ...

> In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. We mention a few.
>
> There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. ...
>
> Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake. ... The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely. [at 1825-30].

Peel v. Attorney Registration and Disciplinary Commission Of Illinois, 109 S.Ct. 3240 (1989)

[In 1987, the Disciplinary Commission of Illinois filed a complaint alleging that petitioner was publicly holding himself out as a certified legal specialist in violation of Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility, by including on his letterhead the statement that he was a certified specialist in trial advocacy. The complaint also alleged violations of Rule 2-101(b), which requires that a lawyer's public "communication shall contain all information necessary to make the communication not misleading and shall not contain any false or misleading statement or otherwise operate to deceive," and of Rule 1-102(a)(1), which generally subjects a lawyer to discipline for violation of any rule of professional responsibility. After a hearing, the Commission recommended censure for a violation of Rule 2-105(a)(3). It rejected petitioner's First Amendment claim that a reference to a lawyer's certification as a specialist was a form of commercial speech that could not be "subjected to blanket suppression."

The Illinois Supreme Court adopted the Commission's recommendation for censure.]

Stevens J.: ...

III

... [T]he question to be decided is whether a lawyer has a constitutional right...to advertise his or her certification as a trial specialist by NBTA. ...

Justice Powell summarized the standards applicable to such claim for the unanimous

Notes and Questions

1. To the extent that the decision in Rocket could be easily decided on the basis that the legislation in question constituted a gross interference with any right to engage in professional advertising, Peel indicates that the constitutional questions at stake may not always be so easily resolved. In particular, this decision provides an interesting dialogue about choice of remedy.

Given agreement by a majority of the Court that the petitioner's letterhead was potentially misleading, what do you think the appropriate remedy should have been: invalidation of a rule that could be unconstitutional in some applications because it prohibited a lawyer from representing himself or herself as a specialist in all circumstances; or application of a rule with potentially overbroad consequences to this case because the particular advertisement by the lawyer subject to disciplinary proceedings in Peel was potentially misleading? In your view, what considerations should determine who receives the benefit of the doubt as between a lawyer in petitioner's situation and State Bar Disciplinary Commission?

2. In Rocket, Justice McLachlin acknowledges that overbreadth does not have application in the cases under the First Amendment that raise issues of commercial expression. Overbreadth is a special doctrine that permits an applicant to raise the First Amendment claims of third parties not before the Court in defence in an action where that person would otherwise have no First Amendment claim. If the petitioner's letterhead was potentially misleading and he therefore was not entitled to the protection of the First Amendment, why should he be entitled to prevail in this case? Why should successful disciplinary proceedings depend on a showing that his advertisement did in fact mislead certain consumers? Is it relevant in determining the constitutionality of hate propaganda provisions, that the perpetrator's opinions did not mislead anyone? Is this a relevant consideration in any case? Should it be considered relevant in commercial expression cases?

3. Once again, the relevant constitutional question is whether the consumer is entitled to have free access to professional advertisements, or whether, on the other hand a regulatory body is entitled to screen the professional solicitations of its members. Without such advertisements, how do consumers get any information about professionals? Are they better served by having no information, or by having some information, some of which may involve enhanced or exaggerated claims as to competence?

4. Should the requirement under s. 1 of the Charter that a law not be excessively vague or uncertain be applied any differently in commercial expression cases? Is it constitutionally acceptable to have a greater margin of imprecision in commercial speech regulations than in political speech restrictions?

Notes and Questions

1. Given the Court's repeated assertions, both in this case and in Rocket, that the Court should take the context into account under section 1 - and in particular the economic context of these cases - can one justify its continued reliance on the Oakes test in these cases?

2. Is the fact that it might be a nuisance a sufficient justification for the infringement of expressive freedom? Can you think of other situations in which the exercise of a section 2(b) right might be a nuisance, but is tolerated nonetheless? Why are the Courts less willing to tolerate the nuisance inherent in street prostitution than the nuisance inherent in a variety of street activities like hawking, peddling, petty sales and pamphleteering? Is the public's moral disapproval of a solicitation activities part of the subtext here? If it is, do you think that is an appropriate consideration? Is the inconvenience of those who must pass by prostitutes or even be confronted by them a relevant consideration?

3. Under the s. 1 test, in deciding whether a **Charter** infringement complied with s. 1, the court must consider if the societal purpose for limiting the constitutional right is "sufficiently important" to warrant the overriding of that **Charter** right, what should the court take into account in deciding whether the government's purpose is "sufficiently important", or "pressing and substantial"? Is it merely a question of whether the law's goal is appealing to the court, or is it something more? What did the supreme Court in fact take into account in this case?

4. As far as the Supreme Court of Canada is concerned, is the prohibition on the solicitation of prostitution only justifiable for acts of solicitation that occur in the streets? Does the prohibition itself speak exclusively in terms of streets, as opposed to other public places? Once the Court has declared the legislation valid, does it matter that it considered the eradication of street prostitution its primary rationale, so long as any subsequent act of solicitation occurs in public? In more abstract terms, once legislation is upheld under the **Charter**, is it possible to argue that it can have unconstitutional applications in situations where the words of the statute unquestionably apply to the facts?

5. Justice Wilson's dissenting opinion emphasizes that, although the act of prostitution is itself not illegal, its solicitation on streets is nonetheless. Given that expressive activity is specifically protected by the **Charter**, and that mere conduct is not, how is it possible for parliament to regulate the solicitation of an activity such as prostitution which is not illegal? This is a question of fundamental conceptual and doctrinal importance.

them and on society generally.

The following is the judgment delivered by

LAMER C.J. (partially concurring):-- I have had the benefit of reading the reasons of my colleagues. I am in agreement with the reasons of my colleague, Iacobucci J., but agree with my colleague, McLachlin J., as to the disposition.

The following is the judgment delivered by

CORY J. (partially concurring):-- Although I am in accordance with the reasons and conclusions of Justice La Forest, I am also in agreement with the reasons of Justice Iacobucci in so far as they declare a suspension of invalidity for one year.

Notes And Questions

1. If you accept La Forest, J.'s summary of the Charter evidence, do you find the majority or the dissenting judgment more compelling?

2. Has the majority applied the s. 1 principles enunciated in cases such as Irwin Toy and Edwards Books correctly, or have these been disregarded as the dissent suggests or implies?

3. Assume that Parliament re-enacts the legislation with very minor differences but essentially the same content. Assume that the appellants attack its constitutionality in court. Assume further that the Crown tenders fresh evidence at trial, not offered in this case, demonstrating that the now-invalid legislation is the least restrictive alternative open to Parliament e.g. by showing that these advertisements do induce non-smokers to smoke. Is the new trial court bound by the legislative facts as enunciated by the majority in this case, or should it reconsider those facts afresh?

[para140] I conclude that the requirement that 50 percent of the principal display surfaces be devoted to a warning of the health hazards of the product is a reasonable measure demonstrably justified in our society and is constitutional under s. 1 of the Charter.

NOTES AND QUESTIONS

1. Can you square the reasoning and outcomes in this case, in the earlier RJR tobacco advertising case, and the Prostitution Reference?

2. Would the same s. 1 approach take place had this not been tobacco advertising? Had it not been advertising?

3. Does the change in the world since the RJR decision sufficiently explain the different outcomes? The change in the legislation under attack? The change in the Court's membership?

Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 106 S. Ct. 2968 (1986)

[The constitutionality of a Puerto Rico statute which prohibited the advertising of casino gambling to Puerto Rican residents, allowing such publicity only outside the country. Appellant sought a declaratory judgment that the statute and regulations impermissibly suppressed commercial speech. The Superior Court of Puerto Rico effectively upheld the legislation by reading it down.]

Rehnquist J.: ...

Because this case involves the restriction of pure commercial speech..., our First Amendment analysis is guided by the general principles identified in [Central Hudson Gas]. ...

[The Court then set out the Central Hudson test and gave reasons why the Puerto Rican legislation passed the first three elements of that test.]

Appellant argues...that the challenged advertising restrictions are underinclusive because other kinds of gambling such as horse racing, cockfighting, and the lottery may be advertised to the residents of Puerto Rico. Appellant's argument is misplaced for two reasons. First, whether other kinds of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling "directly advance" the legislature's interest in reducing demand for games of chance. ... Second, the legislature's interest, as previously identified, is not necessarily to reduce demand for all games of chance, but to reduce demand for casino gambling. ... In other words,

addressed. ... [A] casino advertisement in a publication with 95% local circulation... might actually be permissible, so long as the advertisement "is addressed to tourists and not to residents." ... Then again, maybe...such an ad would not be permissible, and maybe there would be considerable uncertainty about the nature of the required "address." ...

The general proposition advanced by the majority today -that a State may prohibit the conduct altogether - bears little resemblance to the grotesquely flawed regulation of speech advanced by Puerto Rico in this case. The First Amendment surely does not permit Puerto Rico's frank discrimination among publications, audiences, and words. Nor should sanctions for speech be as unpredictable and haphazardous [sic] as the roll of dice in a casino.

Notes and Questions

1. This decision concerns the application of the Central Hudson test, which was cited by the Supreme Court of Canada in Ford, supra. As Posadas illustrates, whether this standard is strict or deferential depends entirely on how it is applied. Does uncertainty about the way in which it will be applied defeat the purpose of a special standard of justification? In other words, if Central Hudson has just as many strict and deferential applications as the Oakes test, does that suggest that a single or monolithic standard of justification can suffice? On the other hand, would it be preferable for the Supreme Court of Canada to articulate a series of issue-specific standards of justification? Why or why not?

2. In his majority opinion, Justice Rehnquist claims that it is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing demand through restrictions on advertising. As Justice Stevens succinctly restates the point, "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling". Do you agree? In addition, Justice Rehnquist appears willing to assume that the restrictions on advertising will in fact reduce the demand for gambling by Puerto Rican residents. Under the Central Hudson test, does the state have the burden to establish the efficacy of its restriction on advertising in order to satisfy the requirement that the restrictions are no more extensive than necessary?

3. Note that a bill "To ban the promotion of tobacco products" was introduced in the One Hundred and First congress. Reciting the dangers of smoking, the bill notes that the tobacco industry spends two billion dollars annually "to attract new users, retain current users, increase current consumption, and generate favourable long-term attitudes towards smoking and tobacco use", and that "tobacco product advertising deceptively portrays the use of tobacco as socially acccptable and healthful". The bill would prohibit all "consumer sales promotion", which includes "all radio and television commercials, newspaper and magazine advertisements, billboards, posters, signs, decals, matchbook advertising, point-of-purchase display material and all other written or other material used for promoting the sale or consumption of tobacco

products to consumers". Under Posadas, would this legislation be upheld, if enacted? Would an indirect approach, such as disallowing deductions for advertising expenses pursuant to the Internal Revenue Code, be more acceptable constitutionally?

4. Would it be constitutional for the province to outlaw "lifestyle" advertisements for alcoholic drinks? Draft a provision which would meet s.1's requirements of clarity, precision, and minimal impairment.

5. Would it be constitutional for the province to pass a law requiring the producers of all alcoholic drinks to include the following on the label of each bottle:

(1) The consumption of alcohol is dangerous to your health.
(2) Alcohol is an addictive drug.
(3) Don't drink and drive!